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Supreme Court of the United States

October Term, 1994

JAN FORSYTH, RICHARD KIRKS,
CHARLES BRUTON, and SUSAN BRUTON,

Petitioners,

v.

MACH VINES, DWIGHT WALKER,
WILLARD ROLLINS, and CITY OF DALLAS TEXAS,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the knowing use and disclosure by law enforcement officers of communications intercepted by private citizens from an illegal wiretap violates the Federal Wiretapping Act, 18 U.S.C. §§ 2511(1)(c) and 2511(1)(d).

2. Whether §§ 2517(1) and (2) of Title 18 of the Federal Wiretapping Act statutorily authorize law enforcement officers to knowingly use and disclose intercepted communications obtained by private citizens from an illegal wiretap.

LIST OF INTERESTED PARTIES

1. The four Petitioners herein, Plaintiffs/Appellants below, are Jan Forsyth, Richard Kirks, Charles Bruton, and Susan Bruton.

2. The Four Respondents herein, Defendants/Appellees below, are Mack Vines, Dwight Walker, Willard Rollins, and the City of Dallas, Texas.

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a – 45a) is reported at 19 F.3d 1527 (5th Cir. 1994). The decision of the district court was not reported but is reprinted herein (App. B, infra, 46a – 55a).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 20, 1994. Petitioners did not seek a rehearing of the decision. This court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

Sections 2511(1)(c) and 2511(1)(d) of Title 18 of the Federal Wiretapping Act provide:

> **§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited**
>
> (1) Except as otherwise specifically provided in this chapter any person who –
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection: or
>
> (d) intentionally uses, or endeavors to use the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection:

shall be punished . . . or shall be subject to suit. . . .

Sections 2517(1) and (2) of Title 18 of the Federal Wiretapping Act provide:

> **§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications**
>
> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

STATEMENT OF THE CASE

Petitioners Jan Forsyth and Richard Kirks were at all times relevant herein, employed as police officers for Respondent City of Dallas, Texas. In December, 1987, Forsyth and Kirks began an investigation of numerous T.O.P.[1] criminals in conjunction with the Drug Enforcement Administration and the Federal Bureau of Investigation.

Respondent Willard Rollins, Captain of the Intelligence Division of the City of Dallas Police Department, supervised the T.O.P. sting operation. To facilitate the investigation, Forsyth and Kirks assumed false identities and held themselves out to the drug underworld as dealers of illegal narcotics. Forsyth and Kirks acted in concert with Petitioners Charles and Susan Bruton, paid government informants. The Dallas Police Department, the Drug Enforcement Administration, and the Federal Bureau of Investigation conducted much of their undercover operation at the Bruton home located at 3737 Middlefield Road in Dallas, Texas.

In March, 1988, while the undercover operation was still ongoing, John Barr,[2] a Dallas attorney, telephoned Forsyth at her residence. Barr had served as a peace officer and as a volunteer with the Dallas Police Department's Narcotics Division. In the course of his work with the Dallas Police Department, Barr learned that Forsyth and Kirks were

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[1] T.O.P. stands for "Top Offender Program". This federally funded program targeted serious criminals for investigation.

[2] John Barr, George Grogan, Homer Dulworth, Gary Dulworth, and Joyce Dulworth were originally named as Defendants in this litigation but settled out of court with petitioners.

working in an undercover capacity with Charles Bruton, and obtained Forsyth's unlisted home telephone number.

Barr called Forsyth at her home to discuss an unrelated civil case involving informant Charles Bruton, and Barr's client, George Grogan. Grogan had hired Charles Bruton to illegally dispose of numerous barrels of toxic chemicals. Charles Bruton had reported the illegal disposal to authorities and a local television station, causing the Texas Water Commission to initiate an investigation of Grogan. Barr sought Forsyth's assistance in getting Charles Bruton to recant his allegations regarding Grogan. Forsyth refused to get involved in the matter.

In June, 1988, Barr and Grogan contacted Homer Dulworth, Joyce Dulworth, and Gary Dulworth, the Brutons' neighbors.[3] Barr and Grogan asked the Dulworths to assist them in either discrediting Charles Bruton, Jan Forsyth, and Richard Kirks or finding a way to force Charles Bruton into recanting his allegations of illegal disposal.

The Dulworths held a grudge against Charles Bruton because he had testified in a criminal trial against their son, Gary Dulworth. Consequently, the Dulworths assisted Barr and Grogan. Petitioners believe that the Dulworths arranged to route the Bruton telephone line into a previously dormant telephone line at the Dulworth's home. The telephone lines were wired together so that whenever the Brutons used their telephone, the Dulworths could surreptitiously monitor the Petitioners' conversations on a telephone extension in the Dulworth home. Barr, Grogan, and the Dulworths monitored and tape recorded the Petitioners' telephone calls.

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[3] Grogan also owned property adjacent to the Bruton home.

Barr decided to use the illegally intercepted and tape recorded telephone conversations to punish Forsyth for not cooperating with him in his effort to get Charles Bruton to alter his expected testimony. On September 22, 1988, Barr went to the Internal Affairs Division of the Dallas Police Department. He presented allegations to Respondents Dwight Walker,[4] Mack Vines, and Willard Rollins, that Jan Forsyth had engaged in criminal and administrative misconduct in her dealings with Charles Bruton.

Respondents Walker, Vines, and Rollins knew that Barr based his allegations on the telephone conversations which the Dulworths had illegally intercepted. Respondents failed, however, to instruct Barr, Grogan, or the Dulworths to cease monitoring the Bruton telephone. Instead, Respondents utilized the illegally intercepted telephone conversations in an Internal Affairs investigation of Forsyth. Because Kirks was Forsyth's partner, his actions were called into question as well, even though a formal charge against him was not made.

Against the advice of the Dallas Police Department's Legal Liaison Division, Respondents Walker, Vines, and Rollins continued receiving intercepted communications from the Bruton telephone. On September 23, 1988, in a meeting with Rollins, Forsyth became suspicious that the Brutons' telephone line was "unsecured". Rollins told Forsyth not to discuss police business over the Bruton telephone, and not to tell anyone, including the DEA, the

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[4] When Barr presented his allegations, Walker was the Captain in charge of the Internal Affairs Division, and Vines was the Dallas Police Chief.

FBI or Charles Bruton, of Rollins' order. For the next two weeks, Forsyth and Kirks worked on the undercover operation at 3737 Middlefield Road while their conversations were intercepted over the Bruton telephone. For approximately ten days, Forsyth and Kirks' "cover" was blown and the two police officers were unknowingly exposed to the drug underworld.

On October 4, 1988, an employee of Southwestern Bell Telephone Company discovered and removed an illegal telephone device that connected the Bruton and Dulworth telephone lines together. It was this device that allowed the Dulworths to monitor the Bruton telephone.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit renders ineffectual the broad statutory prohibition on the use and disclosure of information obtained from an illegal wiretap. 18 U.S.C. §§ 2511(1)(c) and (d). It is inconsistent with the decisions of this Court in *Gelbard v. United States*, 408 U.S. 41, and *United States v. Giordano*, 416 U.S. 505, which narrowly limit the permissible scope of unauthorized interceptions. Moreover, the decision is inconsistent with this Court's decision in *Elkins v. United States*, 364 U.S. 206, because the Fifth Circuit's opinion constructively resurrects the silver platter doctrine. Finally, the case is in direct conflict with the Seventh Circuit's decision in *Rogers v. Wood*, 910 F.2d 444 (1990), and conflicts in principle with the First Circuit's decision in *United States v. Vest*, 813 F.2d 477 (1987). The decision likewise conflicts in principle with

the Sixth Circuit's decisions in *Fultz v. Gilliam*, 942 F.2d 396 (1991) and *United States v. Jones*, 542 F.2d 661 (1976).

I. BY HOLDING THAT POLICE OFFICERS ARE STATUTORILY AUTHORIZED TO USE AND DISCLOSE INFORMATION GLEANED BY PRIVATE CITIZENS FROM AN ILLEGAL WIRETAP, THE COURT OF APPEALS DECISION CONFLICTS WITH THE PRECEDENTS OF THIS COURT AS WELL AS WITH THE STATUTE ITSELF.

A. The Fifth Circuit's Decision Fails To Accord Sufficient Weight To The Underlying Purposes Of The Federal Wiretapping Act.

The statutes at issue herein are found in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2521 (1988). The Act is commonly known as the Federal Wiretapping Act, and the underlying purposes and prohibitions of the Act have been delineated by this Court. "The purpose of the legislation . . . was effectively to prohibit . . . all interceptions of oral and wire communications, except those specified in the Act. . . . " *United States v. Giordano*, 416 U.S. 505, 514. "Except as expressly authorized in Title III, . . . all interceptions of wire and oral communications are flatly prohibited." *Gelbard v. United States*, 408 U.S. 41, 46. "Hence, although Title III authorizes invasions of privacy under certain circumstances, the protection of privacy was an overriding congressional concern." *Id.*

The Fifth Circuit however went outside the scope of the statutory language itself, and failed to rely on this Court's interpretation of that language. Not only was

resorting to legislative history error, but the Fifth Circuit's statutory interpretation strains to justify the exception upon which the opinion relies.

B. The Fifth Circuit Erred In Its Statutory Interpretation of 18 U.S.C. § 2517.

The Fifth Circuit held that a police officer's use and disclosure of information gleaned by a private citizen from an illegal wiretap is statutorily authorized under 18 U.S.C. §§ 2517(1) and (2).[5] The court's reasoning was that the police did not participate in the installation of the wiretap, that police officers have an official duty to investigate internal charges against fellow officers, and that not permitting an exception in this circumstance pursuant to §§ 2517(1) and (2) would work an absurdity on the statute.

Petitioners contend that this reading of §§ 2517(1) and (2) is erroneous and misconstrues the plain language of the statute. The plain wording of the statute at issue in §§ 2517(1) and (2) merely allow police officers to use and disclose information obtained from *legal* wiretaps. The legislative history is clear and contrary to the Fifth Circuit's interpretation.

First, the legislative history of Title III sets forth the only three exceptions to the general prohibition of all

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[5] *See* App. A at 42a.

wiretapping absent judicial authorization.[6] None of the exceptions listed permit private citizens to turn over illegally intercepted conversations to police officers and then permit the police to statutorily use such information. Second, the legislative history states that § 2517 must be

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[6] *See* 1968 U.S. Code Cong. & Admin. News 2112, 2153-54, which provides:

> To assure the privacy of oral and wire communications, title III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause. The only exceptions to the above prohibition are: (1) the power of the President to obtain information by such means as he may deem necessary to protect the Nation from attack or hostile acts of foreign power, to obtain intelligence information essential to the Nation's security, and to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means; (2) employees of the Federal Communications Commission may, in the normal course of employment, intercept and disclose wire communications in the discharge of the monitoring responsibilities discharged by the Commission in the enforcement of chapter 5 of title 47 of the United States Code; and (3) employees of a communication common carrier may intercept and disclose wire communications in the normal course of their employment while engaged in any activity necessary to the rendition of service, or protection of the rights of property of the carrier of such communication.

read in light of § 2518.[7] Section 2518 is that part of the Federal Wiretapping Act which delineates how police officers obtain judicially approved wiretaps.

C. The Fifth Circuit's Decision Constructively Resurrects The Silver Platter Doctrine.

The decision of the Fifth Circuit allows police officers to investigate the validity of criminal complaints made by private citizens who obtain their information from a wiretap that violates 18 U.S.C. § 2511. Such a policy resurrects the silver platter doctrine rejected by this court in *Elkins v. United States*, 364 U.S. 206.

Under the "silver platter" doctrine, evidence of a federal crime seized by state police in the course of an illegal search while investigating a state crime could be turned over to federal authorities and used in a federal prosecution so long as federal agents had not participated in the illegal search but had simply received the evidence on a "silver platter." This doctrine was soundly rejected by this Court in *Elkins*.

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[7] *See* 1968 U.S. Code Cong. & Admin. News at 2188:

> Section 2517 of the new chapter authorizes the use and disclosure of intercepted wire or oral communication in specified circumstances. Section 2517 must, of course, be read in light of Section 2518.
>
> * * *
>
> The proposed provision envisions close Federal, State, and local cooperation in the administration of justice. The utilization of an information-sharing system within the law-enforcement community circumscribed by suitable safeguards for privacy is within the intent of the proposed legislation.

The Fifth Circuit is clearly using the silver platter doctrine in the decision below: although the police cannot wiretap a private citizen to investigate criminal activity absent judicial authorization, if a private citizen violates the act, the Fifth Circuit permits the police to use and disclose the contents of illegally intercepted conversations to investigate crime. In essence, the private citizen is handing illegally intercepted conversations over to the police for investigation on a silver platter. Such a policy as that articulated by the Fifth Circuit clearly violates the clear dictates of *Elkins*.

II. THE FIFTH CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS REGARDING THE INTERPRETATION OF THE FEDERAL WIRETAPPING ACT.

A. The Fifth Circuit's Decision Conflicts With The Seventh Circuit's Decision In *Rogers v. Wood*.

In *Rogers v. Wood*, 910 F.2d 444 (1990), the Sixth Circuit refused to recognize a common law privilege protecting statements made to police officers in furtherance of investigating criminal activity as an exception to the Federal Wiretapping Act. *Id.* at 447.[8]

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[8] The Seventh Circuit noted that

> "[t]he very nature of the Act is to impose limitations on the effectiveness of law enforcement agents in the interests of protecting the privacy of citizens.
>
> * * *
>
> "The Act represents Congress's careful balancing between the interests of the enforcement of criminal laws and the assurance of privacy in oral and wire

The Seventh Circuit's reasoning directly conflicts with that of the Fifth Circuit. The Fifth Circuit reasons that not allowing the police to use illegally obtained information to investigate potential criminal conduct "flies in the face of common sense, and would require [a reading of] § 2517(1) and (2) in a manner that compels an absurd result." App. A at 38a. Although the Seventh Circuit did not specifically address § 2517(1) and (2), their underlying reasoning still conflicts with that of the Fifth Circuit.

B. The Fifth Circuit's Decision Conflicts In Principle With The First Circuit's Decision in *United States v. Vest.*

Critical to the Fifth Circuit's decision is that the police officers who used and disclosed the illegally intercepted communications had no involvement in physically wiretapping the petitioners. Rather, the police were approached and given information by private citizens. This is important, reasons the Fifth Circuit, because it gives the police clean hands insofar as the actual wiretap itself. The First Circuit in *United States v. Vest*, 813 F.2d 477 (1987) rejected this reasoning. The First Circuit noted:

> [a]n invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere. The impact of this second invasion is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a

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communications. To recognize a common law privilege . . . would upset that balance". *Id.* at 447.

> communication illegally intercepted by the guilty interceptor. . . . *Id.* at 481.

Importantly, and in contrast to the Fifth Circuit, the *Vest* court noted that their job in construing the Wiretapping Act was limited to interpretation rather than modification. *See id.* The Fifth Circuit's ruling modifies rather than interprets the Federal Wiretapping Act.

C. The Fifth Circuit's Decision Conflicts In Principle With The Sixth Circuit Decisions in *Fultz v. Gilliam* and *United States v. Jones.*

The Sixth Circuit's decisions in *Fultz v. Gilliam*, 942 F.2d 396 (1991) and *United States v. Jones*, 542 F.2d 661 (1976) both found the Wiretapping Act clear and unambiguous with respect to prohibiting the use and disclosure of all illegal wiretaps. *Gilliam* at 400-401; *Jones* at 666-67. Neither opinion finds the statutory language on this issue either arbitrary or confusing. *Id.* The Fifth Circuit however, to reach its ultimate conclusion, found the statute so ambiguous and unclear that resort to legislative history and statutory construction was required. App. A at 34a. Petitioners urge the Court to find that the decisions in *Gilliam* and *Jones* are correct because the Wiretapping Act is clear and unambiguous. Therefore, resort to statutory construction by the Fifth Circuit was error. Absent resorting to statutory interpretation, the Fifth Circuit's decision cannot stand.

III. PUBLIC POLICY DICTATES THAT THE WRIT BE GRANTED.

The Fifth Circuit's decision opens the flood gates to the possible unlimited use of information by the police obtained by private citizens in violation of the Federal Wiretapping Act. Such an open ended road flies in the face of the dual purposes Congress had in mind when it enacted Title III:

> Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized. Sen. Rep. No. 1097, 90th Cong. 2nd Sess., reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2153.

Moreover, the two leading wiretap law commentators are at odds over where the line should be drawn regarding this important issue. *Cf.* James G. Carr, *The Law of Electronic Surveillance*, § 7.4(b), at 7-47 (1993) (noting that such use by the police violates the Act) *with* Clifford S. Fishman, *Wiretapping and Eavesdropping*, § 25 at 41 (1978) (noting that police should be able to use such information.) Petitioners urge that the Court should take up these important questions to determine the scope of permissible police conduct regarding the use and disclosure of information obtained from illegal wiretaps.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1052

JAN FORSYTH, ET AL.,

Plaintiffs-Appellants,

versus

JOHN HOLMAN BARR, ET AL.,

Defendants,

MACK VINES, DWIGHT WALKER,
WILLARD ROLLINS,

Defendants-Appellees,

versus

CITY OF DALLAS, TEXAS,

Defendant-Appellee-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(Filed April 20, 1994)

Before WISDOM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges. BARKSDALE, Circuit Judge:

At issue is a summary judgment awarded the appellees (City of Dallas and three of its police officers) on the appellants' claims under the Federal Wiretap-Act, 18 U.S.C. §§ 2510-2520: (1) for interception by a third person (appellants claim conspiracy) of the appellants' telephone

conversations, when two of the appellants were police officers involved in an undercover operation; and (2) for the appellees' disclosure and use of the contents of those intercepted conversations for a police internal affairs investigation, conducted after that information was conveyed to the police as part of the bases for charges against one of the appellants (an officer).

The appellees deny that they were involved in the interception of the communications, but they did disclose and use the information in their investigation. In the final analysis, the summary judgment hinges on whether the disclosure and use were permitted by the Act, it being undisputed that they were "appropriate to the proper performance of the [appellee officers'] official duties", as provided for in § 2517(1) and (2). The linchpin to that question, assuming that the third person illegally intercepted the information, is whether the appellee officers' "obtain[ing]" that information from that person was "by any means authorized by" the Act, as found in § 2517(1) and (2). The meaning of this phrase is far from clear; but the legislative history sanctioning such disclosure and use of illegally intercepted information is crystal clear.

The persons whose conversations were intercepted – Jan Forsyth and Richard Kirks (the officers), and Susan and Charles Bruton (the latter being an informant) – appeal from the judgment for the City, Dwight Walker, Willard Rollins, and Mack Vines. The City appeals being required to provide independent counsel for Vines. We **AFFIRM.**

I.

Dallas police officers Forsyth and Kirks, two of the four appellants, were assigned to the Intelligence Division. In December 1987, under the supervision of appellee Rollins of that division, they began an undercover investigation, with appellant Charles Bruton acting as an informant. His wife, appellant Susan Bruton, had been an informant previously for Forsyth. The investigation was conducted, in part, from the Brutons' home in Dallas, including over their telephone.

While the undercover investigation was ongoing, appellant Forsyth was telephoned in March 1988 by John Barr, a Dallas attorney,[1] about an unrelated civil case involving appellant Charles Bruton (the informant) and Barr's client, George Grogan.[2] The appellants alleged in their complaint that Grogan had hired Bruton to illegaly dispose of toxic chemicals; that he had reported the illegal disposal, causing state environmental authorities to initiate an investigation of Grogan; that Barr sought Forsyth's assistance in having Bruton recant his illegal disposal charges; and that Forsyth refused to become involved.

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[1] Barr, who described himself as a "cop groupie", occasionally accompanied Dallas police officers in the execution of warrants.

[2] Grogan, a businessman and former member of the Dallas Planning and Zoning Commission, owned property next to the Brutons' home.

The appellants further alleged in their complaint that, in June 1988, Barr and Grogan contacted the Dulworths, neighbors of both Grogan and the Brutons,[3] and asked for their assistance either in discrediting Charles Bruton, Forsyth, and Kirks, or in finding a way to force Bruton to recant his waste disposal charges; that the Dulworths held a grudge against Bruton because he had testified in a criminal trial against Gary Dulworth; that the Dulworths arranged to route the Brutons' telephone line into a previously dormant line at the Dulworths' home, so that, on an extension in their home, the Dulworths could listen to the Brutons' telephone conversations; and that Barr, Grogan, and the Dulworths monitored and recorded the Brutons' calls, in violation of the Wiretap Act.

On September 22, 1988, Grogan, Barr, and one of Barr's law partners met with appellee Walker, who was in charge of the police Internal Affairs Division, and charged that Forsyth had engaged in criminal and administrative misconduct during the undercover investigation.[4] Walker was told that, over one of her telephones, Mrs. Dulworth had overheard conversations between Charles Bruton and Forsyth; that Mrs. Dulworth thought that the telephone had been disconnected, but that it had suddenly become operable; and that she had told Grogan

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[3] Homer and Joyce Dulworth, and their son, Gary, resided across the street from the Brutons.

[4] The appellants alleged that Barr used the illegally intercepted conversations to punish Forsyth and Kirks for not cooperating with him regarding Charles Bruton and Grogan's toxic waste disposal.

that she believed that her telephone line had become crossed with the Brutons'. Barr told Walker that a wiretap was not involved, and Walker believed that the telephone had become a party line accidentally.

At the meeting, Barr made very serious charges against Forsyth and the Brutons.[5] At the conclusion of the meeting, Walker was not certain which charges arose out of the telephone eavesdropping and which came from other sources. At least some of the information was

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[5] On September 22, Barr submitted an affidavit summarizing his charges against Forsyth. Also at the meeting that same day, Barr told Walker that he and Grogan believed that Forsyth was making arrangements for the dismissal of environmental fines of approximately $30,000 against Charles Bruton; that Bruton and Forsyth were involved in a personal relationship and possibly had taken a trip to Tennessee together; that Forsyth possibly had covered up, or arranged for charges to be dropped regarding, a murder-for-hire scheme in which Charles and Susan Bruton tried to kill her ex-husband; that Forsyth had misrepresented to a state judge the nature of Charles Bruton's work as an informant for her; that Charles Bruton was to receive "half the dope" in a narcotics deal; and that Forsyth knew that Charles Bruton had convinced a Darrell Smallwood to burglarize Grogan's house, but had failed to see that charges were filed against either of them. As to the burglary, Barr told Walker that he learned about it from visiting Smallwood in jail.

Walker was also informed that Grogan had understood from prior conversations with Mrs. Dulworth that the City had made a deal with Charles Bruton to allow him to illegally mine Grogan's property; and that Mrs. Dulworth had told Grogan that she overheard on her telephone: that some environmental matters needed handling, that Charles Bruton was calling for "Jan" (Forsyth) and that Jan was the only one who could control Bruton, that there were dead bodies and dead dogs on the property (unclear whether Grogan's or Brutons'), and that Charles Bruton was being protected by Dallas police officers.

obtained by Barr, his law partner, and Grogan from sources other than the intercepted conversations. Walker assumed that information about a personal trip by Forsyth and Charles Bruton was overheard. *See* note 5, *supra*. The information about Charles Bruton participating in a drug deal was overheard also. *See* note 5.

Walker decided to conduct a preliminary internal affairs investigation of the charges. Such investigations are conducted to ensure the integrity of the police department. They are not considered formal complaints; and, unless a violation is identified, they are not reflected in the personnel record of the investigated employee.

On either September 22 or 23, Walker informed appellee Rollins (the supervisor of Forsyth and Kirks' undercover investigation) about the meeting with Barr and the charges against Forsyth. In turn, on either September 22 or 23, Rollins informed Lieutenant Lybrand (one of Forsyth and Kirks' supervisors) about the charges. Lybrand advised Rollins that the police department should investigate whether a wiretap was in place; Rollins responded that any investigation should be performed by the FBI.

With Lybrand present, Rollins met on September 23 with Kirks and Forsyth, informed Forsyth that a complaint had been filed against her, and instructed them not to discuss police business over the Brutons' telephone or to tell anyone that he had given them that order. Kirks and Forsyth left the meeting believing that there was a "legal wiretap" on the Brutons' line, although neither Rollins nor Lybrand told them anything about a wiretap. They interpreted Rollins' instructions as permitting non-

business discussions, and continued to have conversations on the line after September 23.[6] Rollins assumed that business was the extent of the relationship between the Brutons and Kirks and Forsyth,[7] and did not anticipate that the officers would continue to use the Brutons' telephone.

Shortly after the September 22 meeting with Walker, Grogan contacted City Manager Richard Knight about the matter, because Mrs. Dulworth had advised Grogan that she had overheard another telephone conversation in which Charles Bruton had said that the telephone line was "hot". Grogan concluded that Walker had disclosed to Forsyth and Kirks the information received from Barr and him (Grogan). At Knight's request, appellee Vines, the Chief of Police, met with Grogan. Vines was kept apprised of the progress of the internal affairs investigation.

On September 26, Walker gave his notes from the September 22 meeting to Detective Jennings of the Internal Affairs Division, and described that meeting and the charges against Forsyth. In conducting the preliminary investigation, the appellees used the information received

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[6] Kirks' deposition testimony is inconsistent on whether he and Forsyth followed Rollins' instructions not to discuss police business on the line. Although Kirks initially testified that they had complied with the order, he later testified that not all of the calls made after Rollins gave the order were personal.

[7] In support of their motion for summary judgment, the appellees submitted a copy of the procedures for dealing with informants, including the following: "The relationship between an officer and an informant should always be strictly professional".

on September 22 from Grogan, Barr, and his partner, including the information obtained from intercepted conversations and that obtained from other sources.

Jennings interviewed Barr on October 3, regarding the condition of the Dulworths' telephone and the charges.[8] That same day, after interviewing Barr, Jennings contacted Southwestern Bell Telephone Company and requested a check on the Dulworths' telephone line. In response, a Southwestern Bell employee went to the Dulworths' home the next day, October 4. With Charles Bruton present, the employee located and disconnected a spliced wire connecting the Dulworths, and Brutons' lines. Bruton told the employee that he knew that the Dulworths had been "wiretapping" or "listening in" on his telephone.[9] The employee removed the connectors and gave them to Charles Bruton, who turned them over to Kirks. Later, Jennings gave them to the FBI.

Upon completing the internal affairs report, Jennings forwarded it to the chain of command on November 2, 1988. The investigation resulted in charges against Forsyth being classified as "unfounded".

Forsyth and Kirks filed suit against Barr, Grogan, the Dulworths, the City, Vines, Rollins, and Walker in February 1989. They alleged that the Dulworths "entered into

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[8] Jennings did not interview Barr earlier because of the illness and death of Barr's father.

[9] Charles Bruton stated by affidavit that a Bobby Woods told him "in late September" that his (Bruton's) telephone was tapped by the Dulworths or that they were listening to conversations. Forsyth stated by affidavit that, on September 25, 1988, Woods told Bruton about the eavesdropping.

an illegal agreement with BARR and GROGAN to illegally intercept and/or record and/or illegally use information from telephone conversations" between Charles Bruton and Forsyth and Kirks; and that Vines, Rollins, and Walker, on behalf of the City, "knowingly accepted and used information illegally intercepted from [such] telephone conversations". In August 1989, the action was consolidated with a similar case filed by Charles and Susan Bruton.[10]

In April 1991, the appellees (City, Walker, Vines, and Rollins) moved for summary judgment; and the district court granted summary judgment that November, later denying a motion for reconsideration. The appellants settled their claims against Barr, Grogan, and the Dulworths; those claims were dismissed in November 1992.

II.

The standards for a summary judgment and our plenary review of it are well established and should be well known. *E.g., LeJeune v. Shell Oil Co.*, 950 F.2d 267, 268 (5th Cir. 1992). But, because of the factually driven interception claim in this case, and the appellants' failure to comply in some instances with the procedure for showing a material fact issue for that claim, they bear repeating in some detail.

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[10] Southwestern Bell was named as a defendant in the Brutons' original complaint, and in Forsyth and Kirks' first amended complaint. On the appellants' motion, Southwestern Bell was dismissed.

We employ the same criteria as the district court, viewing all facts, and the inferences to be drawn from them, in the light most favorable to the non-movants. *Id.* at 268. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he substantive law will identify which facts are material". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[A] dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party". *Id.* at 248; *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The movant has the initial burden of demonstrating the absence of a material fact issue. *St. Paul Ins. Co. v. AFIA Worldwide Ins. Co.*, 937 F.2d 274, 279-80 & n.6 (5th Cir. 1991). If it satisfies that burden, the non-movant must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Needless to say, unsubstantiated assertions are not competent summary judgment evidence. *Id.* at 324. "Summary judgment, to be sure, may be appropriate, even in cases where elusive concepts such as motive or intent are at issue, . . . if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993).

As the basis for civil recovery, the appellants claimed violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2520 (the Act), alleging the intentional interception, disclosure, and use of wire communications.[11] (The Act frequently makes reference to "this chapter"; for purposes of this opinion, it is found in Chapter 119 of 18 U.S.C.) The district court granted summary judgment on the grounds that (1) there was no evidence that the appellees had intercepted the conversations; and (2) the appellees did not violate the Act either by disclosing to other officials, for purposes of the internal affairs investigation, information obtained from an illegal wiretap, § 2517(1), or by using that information in the investigation, § 2517(2).[12]

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[11] Section 2520, which authorizes civil recovery for violations of the Act, states in pertinent part:

> [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a).

[12] The district court did not base its ruling on the individual appellees' qualified immunity claim. Of course, even if we were to conclude that the reasons given by the district court do not support summary judgment, we may affirm it on any other grounds supported by the record. *E.g., Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1146 (5th Cir. 1993). In any event, as discussed *infra*, we affirm on grounds relied upon by the district court.

"[The Act] has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (quoting S. Rep. No. 1097, 90th Cong., 2d Sess., 66 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153).

> [The Act] authorizes the interception of private wire and oral communications, but only when law enforcement officials are investigating specified serious crimes and receive prior judicial approval, an approval that may not be given except upon compliance with stringent conditions. . . . Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, . . . and the victim of such interception, disclosure, or use is entitled to recover civil damages. . . . [The Act] also bars the use as evidence before official bodies of the contents and fruits of illegal interceptions, . . . and provides procedures for moving to suppress such evidence in various proceedings. . . .

Id. at 46. "[A]lthough [the Act] authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern". *Id.* at 48. "The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression." *United States v. United States District Court*, 407 U.S. 297, 301-02 (1972).

A.

Except as authorized, the Act prohibits the intentional interception of wire communications.[13] "A telephone conversation is a wire communication." *Briggs v. American Air Filer Co., Inc.*, 630 F.2d 414, 417 (5th Cir. 1980).[14] "Intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device". 18 U.S.C. § 2510(4). And, "the wording of the statute, while broad, requires that interceptions be intentional before liability attaches, thereby excluding inadvertent interceptions". *Thompson v. Dulaney*, 970 F.2d 744, 748 (10th Cir. 1992).[15] An "interception" "require[s] participation by the one charged with an

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[13] The Act provides, in relevant part:

> (1) Except as otherwise specifically provided in this chapter[,] any person who –
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication . . .
>
> shall be subject to suit. . . .

18 U.S.C. § 2511(1)(a). As noted, "this chapter", as used in the foregoing section, refers to the Act.

[14] "Wire communications, unlike oral communications, are protected against interception by electronic, mechanical, and other devices regardless of the speaker's expectation of privacy". *Briggs*, 630 F.2d at 417 n.4.

[15] In *United States v. Savage*, 564 F.2d 728 (5th Cir. 1977), our court, addressing a situation in which a motel switchboard operator stayed on the telephone line and overheard a suspicious conversation, stated:

> We find no evidence that Congress in passing [the Act] . . . intended such conduct to be unlawful. . . . This is not the case of an illegal wiretap by the

'interception' in the contemporaneous acquisition of the communication through the use of the device." *United States v. Turk*, 526 F.2d 654, 658 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976).[16] "[N]o new and distinct interception occurs when the contents of a communication are revealed through the replaying of a previous recording." *Id.* at 659.

Appellants conceded at oral argument that the appellees did not install any device or listen to any conversations; nor is there any evidence either that the appellees actually participated in causing the lines to be wired so that the Dulworths could intercept the conversations, or that, prior to the September 22 meeting between Barr,

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> Government or the case of a malicious violation of one person's privacy by another through intentional eavesdropping. It is the simple case of a motel switchboard operator who inadvertently heard a suspicious conversation in the course of her employment and in good faith told a policeman what she had heard. The telephone conversation was therefore admissible as evidence [in the criminal prosecution].

Id. at 732.

Similarly, in *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979), an FBI agent reconnected an unplugged telephone during the execution of a search warrant and received 42 calls. Our court held that this did not violate the Act, despite the fact that the FBI never obtained judicial authorization for the challenged activity: "Even if we assume that these actions constituted an 'interception' under [the Act], it is clear that they did not violate that statutory scheme." *Id.* at 862.

[16] On summary judgment, the non-movant "can raise a question of fact regarding . . . actual interception of his conversations without proving the contents of specific conversations allegedly intercepted". *Walker v. Darby*, 911 F.2d 1573, 1578 (11th Cir. 1990).

Grogan, and appellee Walker, the appellees had any knowledge that the Dulworths were able to do so. Nevertheless, the appellants assert that the appellees are liable for intercepting those conversations. As factual support for this claim, they rely in large part on the fact that the appellees, after learning about the Dulworths' ability to intercept, allowed the situation to continue for almost two weeks before having a possible wiretap investigated. They also claim a conspiracy, maintaining that the appellees are therefore liable for the alleged illegal interception, even if they did not participate in it.

In support of their summary judgment motion, the appellees submitted considerable evidence that, after the September 22 meeting, no City employee, including appellees Walker, Rollins, or Vines, procured anyone to monitor the calls. This evidence included Joyce Dulworth's deposition testimony that she did not have an agreement with the City or any police officers to furnish them information that she intercepted; that Jennings did not ask her to notify him if she intercepted anything else; and that no one told her to listen to future calls. Likewise, in their affidavits, Walker and Rollins stated that they did not have an agreement with anyone that the contents of intercepted conversations would be reported to them or anyone else.

The appellees also submitted evidence pointing out the weaknesses in the evidence supporting the appellants' interception claims, including Forsyth's, Kirks', and Susan Bruton's deposition testimony, which reflects only conclusory, unsubstantiated claims that the appellees

arranged to receive additional information after the September 22 meeting,[17] and Kirks' and Forsyth's interrogatory answers. When asked what actions by Vines, Rollins,

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[17] Forsyth testified:

> Q: Do you have any knowledge, either first-hand or hearsay knowledge, that the police department made some kind of arrangement with anyone to continue to receive information from Mrs. Dul[ ]worth or any of the Dul[ ]worths after September 22nd, 1988?
>
> A: By leaving the telephone tap in place, which allowed the Dul[ ]worths to continue to monitor conversations and to continue to get back to Grogan and continue to get back to John Barr, who returned to the police department with more information off the telephone, yes.
>
> Q: I'm asking you if you have any evidence or any information about an affirmative agreement between the Dallas Police Department and anyone else that they would give further information to the Dallas Police Department?
>
> A: Other than the fact that John Barr told the Internal Affairs Division that he didn't want the Dul[ ]worths bothered in so many words; that he had more information that he had, based on hearsay; and he was planning to come back with more information. The telephone remained unsecure. They did not call Southwestern Bell. They allowed the telephone to remain in place. All those indicate to me that they had an agreement.

Kirks testified:

> A. I think it is a matter of record of what Jagg[ ]i [an assistant City Attorney] told them. He says it is a wiretap. Get away from it.
>
> . . . .
>
> And if he is telling them it is a wiretap and to get away from it and they don't get away from it, they do continue to monitor, then in all likelihood they are going to come back and try to cover their butts and

and Walker violated the Act, they responded that each "illegally used information obtained from an illegal telephone interception"; illegal interception *by the appellees* was not claimed. (Emphasis added.) Another interrogatory asked the appellants to state the factual basis for their assertion that Walker, Rollins, and Vines prearranged to receive illegally intercepted information. In

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> lie, and they did lie, and they are still lying today. That's speculation, but I am sure going to court with it.
>
> Q. So it is your contention that Louis Jagg[ ]i told them not to monitor the phones and they did it anyway?
>
> A. Absolutely.
>
> . . . .
>
> They are monitoring it. They are also intercepting it, even though they are procuring another person to do it.
>
> Q. Whom did they procure to do it for them?
>
> A. I don't know. John Barr and George Grogan are the one[s] that brought it up to the I.A.D. [Internal Affairs Division] complaint.
>
> Q. So you think they had an arrangement with John Barr and George Grogan that they were supposed to keep them posted or go out there and gather more information?
>
> A. Certainly. Why else would they leave it in place?. . . .

(Claiming the attorney-client privilege, the City consistently objected to the appellants' attempts to testify about advice allegedly given to Walker and Rollins by attorneys with the City Attorney's Office.)

Susan Bruton testified:

> Q. Specifically, what is it in this case that the City of Dallas did which acted in furtherance of the unlawful telephone activities?
>
> A. They permitted the wiretap to continue.

essence, they responded that the appellees, *after* being made aware on September 22 of the interception, continued to receive information from intercepted conversations, and failed to take steps to have the tap removed until October 4.[18]

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[18] Forsyth and Kirks responded to the interrogatory as follows:

> On September 22, 1988[,] the police officials were made aware of the telephone conversations that were illegally intercepted, used and disclosed. Because the illegally intercepted telephone conversations involved two of their employees, they attempted to continue to monitor these conversations by seeking advice from [the] City Attorney's Office. When they realized the illegality of the situation they not only failed to check for a device which enabled these conversations to be illegally intercepted by a known target who was in the Targeted Offender Program in the Intelligence Division, but they also continued to receive information provided by the Targeted Offender's family as they continued to listen in to more illegally intercepted telephone conversations. When Detective Jennings sent Southwestern Bell to the location to check for a device enabling these illegally intercepted telephone conversations on October 4, 1988[,] a device was in fact removed. When the police officials learned that Southwestern Bell had in fact removed a device they became very upset that this was done without their approval. The aforementioned circumstances could hardly be characterized as "inadvertent".

Susan and Charles Bruton responded to this same interrogatory as follows:

> Do not understand question. The information is in Dallas Police Department I.A.D. file and depositions of Lt. Jennings and John James indicated that these defendants had knowledge and did nothing to correct the situation.

1.

With their response to the summary judgment motion, the appellants filed two volumes of evidentiary material, tabbed "A" through "VV", but referred specifically to only four items: Tab "A", the 177-page internal affairs investigation report and attachments (without pointing to any specific portions of this document); and Tabs "B", "C", and "E" – the individual appellees' interrogatory answers regarding the basis for their good faith defenses. These specific references were cited in opposition to the individual appellees' qualified immunity claim.

When the movant has made a properly supported motion for summary judgment by demonstrating an absence of evidence to support the non-movants' case, as the appellees did, the non-movants must "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate *'specific facts showing that there is a genuine issue for trial'*." *Celotex Corp. v. Catrett*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)) (emphasis added); *see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 98 (1992).

Accordingly, the appellants had the burden of presenting evidence sufficient to demonstrate the existence of a material fact issue on whether the appellees intentionally intercepted their conversations. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 257. To satisfy this burden, they were required to identify specific evidence in the record, and to articulate the "precise manner" in

which that evidence supported their claim. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82 (1992); *see also Krim v. BancTexas Group, Inc.*, 989 F.2d at 1443.

They did not do so. Instead, they offered only vague, conclusory assertions that their "evidentiary materials . . . demonstrate circumstantial evidence of a conspiracy and/or joint action on the part of Vines, Walker, Rollins, and the City"; that "there is clear evidence that the aim of the conspiracy was to use information from illegally intercepted telephone conversations presented to these Defendants by Barr, Grogan and the Dulworths"; and that "there is abundant evidence, both circumstantial and direct, that would allow a jury to find that the City and its employee Defendants worked together to accomplish and cause an[] illegal wiretap to remain in place and thereafter use information obtained from an illegal wiretap in violation of . . . [the Act]". But, although they submitted two volumes of evidentiary material, they did not identify the specific portions of such evidence (if any) that supported their illegal interception claim. The appellants' response and supporting evidence are insufficient to preclude summary judgment. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment". *Skotak*, 953 F.2d at 915 & n.7.

Nor is it our duty to do so on appeal. The appellants' opening brief contains similar conclusory assertions that they presented direct and circumstantial evidence that the appellees conspired with Barr, Grogan, and the Dulworths. But, contrary to Fed. R. App. P. 28(a)(5), they furnished no record cites to such evidence. In their reply

brief, for the first time, they attempt to designate specific portions of the record to support their opposition to summary judgment. This attempt comes far too late – obviously, it should have been done in the district court. *See, e.g., Topalian*, 954 F.2d at 1131-32 n.10; *cf. United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir.) ("This Court will not consider a new claim raised for the first time in an appellate reply brief".), *cert. denied*, 493 U.S. 932 (1989).

2.

But, even if we were to consider the evidentiary material designated for the first time in the reply brief, we would still affirm summary judgment on the interception claim. That evidence, viewed in the light most favorable to the appellants, establishes only that the appellees (1) knew that some of the information related to Walker at the September 22 meeting was obtained from telephone conversations overheard by Mrs. Dulworth, and (2) failed to investigate promptly a possible wiretap.

This notwithstanding, relying on *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), the appellants maintain that the appellees did not satisfy their initial burden under Rule 56 because they "failed [to] produce evidence which would completely nullify any inference of a conspiracy". This reliance is misplaced because, unlike the plaintiff in *Adickes*, the appellants did not plead conspiracy. *See id.* at 148. Therefore, the appellees, as part of their summary judgment burden, were not required to demonstrate the absence of a material fact issue as to conspiracy. Nevertheless, as described above, they submitted considerable evidence negating its existence. And, as also described earlier, this evidence was not refuted by the appellants in a manner sufficient to satisfy Rule 56.

In light of the appellants' scant proof, a reasonable jury could not return a verdict for them (non-movants) on the claim that the appellees intentionally intercepted, endeavored to intercept, or procured anyone to intercept, the conversations; therefore, there was not a material fact issue on this claim.[19] Accordingly, summary judgment on the interception claim is proper.

B.

With certain exceptions, § 2511(1) (c) and (d) of the Act prohibit the intentional disclosure or use of information obtained through a wire intercept if the person doing so "knew or had reason to know that the interception itself was in violation of [the Act]". *United States v. Wuliger*, 981 F.2d 1497, 1501 (6th Cir. 1992).[20] Liability for disclosure or use

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[19] We note that some of that evidence is challenged by the appellees as inadmissible hearsay or, again, as being based on matters within the scope of the attorney-client privilege. We need not reach those contentions; even considering the challenged evidence, a material fact issue is lacking.

[20] The Act provides in pertinent part:

> (1) Except as otherwise specifically provided in this chapter any person who –
>
> . . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the

requires proof that it was intentional, that the information was obtained from an intercepted communication, and that the defendant knew or should have known that the interception was illegal.[21] Accordingly, "knowledge or reason to

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information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished . . . or shall be subject to suit. . . .

18 U.S.C. § 2511(1) (c) and (d).

[21] Liability for *intercepting* or procuring another to intercept communications under subsections (a) and (b) of § 2511(1) requires that a plaintiff prove intentional conduct. However, liability under subsections (c) and (d) of § 2511(1) for *use and disclosure* of information obtained from the contents of intercepted communications requires more. The use or disclosure must still be intentional, but in addition, a plaintiff must show that a defendant "know[s] or ha[s] reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." This language, found in each of subsections (c) and (d), compels the conclusion that, to establish liability under one of those sections, a plaintiff must demonstrate a greater degree of knowledge on the part of a defendant. The defendant must know 1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of [the Act].

Although a defendant may be presumed to know the law, . . . to establish use and disclosure liability under [the Act], a defendant must be shown to have been aware of the factual circumstances that would violate the statute. For example, it is not enough to show that a defendant merely knew he was using or

know of the illegality is an element of this offense". *Id.*

Although there is a factual dispute as to when or whether the appellees knew, or should have known, that the communications might have been intercepted illegally, it is undisputed that, in connection with conducting the preliminary internal affairs investigation, and without investigating the legality of the interception, the appellees (1) disclosed the contents of intercepted communications to other law enforcement officers; and (2) used those contents – to the extent that the charges against Forsyth were based on the communications.[22] We assume an illegal interception.[23] Civil liability for such disclosure and use, in such an investigation, of information derived from an illegal interception, when the information was obtained from a third party interceptor without wrongdoing by the officers, appears to be an issue of first impression.

> disclosing information from an intercepted communication. It must also be shown that the defendant knew, *inter alia*, that neither party to the intercepted conversation had consented to the interception.

Thompson v. Dulaney, 970 F.2d at 749 (emphasis in original; citations omitted).

[22] It is not clear from the record whether some, or all, of the contents were disclosed and used. Because we view the evidence in the light most favorable to the non-movants, we assume the latter.

[23] Because of possible defenses, such as consent, *see* § 2511(2) (c), (d), we do not reach whether the interception by either the Dulworths, or Barr, or Grogan was illegal. As noted, the appellants settled with each.

The appellees maintain that the summary judgment on the disclosure and use claim can be affirmed on two separate bases: (1) the interception was impliedly consented to by the appellants, each of whom used the Brutons' telephone with awareness that it was not secure; and (2) the disclosure and use was authorized by the Act, § 2517(1) and (2). In addition, the individual appellees (Vines, Walker, and Rollins) claim qualified immunity, asserting that there was no clearly established law that an internal investigation of a police officer, based upon information presented to her superiors that was overheard by a third party, violates the Act. And, the City maintains that the Act does not permit municipal liability. *See* 18 U.S.C. § 2520(a) (Supp. 1993). Because we hold that the disclosure and use were permitted by § 2517(1) and (2), we need not reach the other issues.[24]

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[24] As discussed *infra*, whether the Act proscribes the disclosure and use is a difficult issue. This militates in favor of reaching the qualified immunity claim instead. But, even if the individual defendants/appellees were sheltered by such immunity, the liability *vel non* of the City would remain; and that issue calls into play a statutory construction question that is perhaps as difficult, if not more so, than that for disclosure and use. *See, e.g.*, 18 U.S.C. §§ 2510(6), 2511(1), 2520(a) (amended in 1986 to include any "entity" as a party from which civil recovery is permitted); *Bodunde v. Parizek*, 1993 WL 189941 (N.D. Ill. 1993); *PBA Local No. 38 v. Woodbridge Police Department*, 832 F. Supp. 808 (D.N.J. 1993); *Amati v. City of Woodstock, IL*, 829 F. Supp. 998 (N.D. Ill. 1993). For this reason, and because addressing whether disclosure and use is statutorily permitted pertains to all of the defendants/appellees, we address that issue.

1.

At the outset, we reject the appellants' contention that illegally intercepted information cannot be used for any purpose whatsoever. In support, they rely on § 2515, which provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515.[25]

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[25] Our court has described § 2515 as "poorly drafted":

> Read literally, the provision is circular; it proscribes the reception into evidence (and thus the disclosure) of information the disclosure of which "would be in violation of this chapter." "Disclosure" apparently refers to disclosure at trial rather than disclosure among various departments of the government at some earlier point; otherwise, the statute would presumably refer to information the disclosure of which "has been" in violation of the chapter. At any rate, the provision should not be read in an overly literal fashion. The section's primary purpose is apparently to exclude evidence derived from illegal, rather than legal, wiretaps. The section's main thrust is therefore to exclude evidence the *seizure* of which was in violation of the chapter, not evidence the *disclosure* of which was or would be in violation of the chapter.

Fleming v. United States, 547 F.2d 872, 874 (5th Cir.), *cert. denied*, 434 U.S. 831 (1977).

Section 2515 is "the statutory exclusionary rule". *Fleming v. United States*, 547 F.2d 872, 873 (5th Cir.), *cert. denied*, 434 U.S. 831 (1977); *see also United States v. Wuliger*, 981 F.2d at 1505 (same); *United States v. Cianfrani*, 573 F.2d 835, 855 (3d Cir. 1978) (same); *United States v. Phillips*, 540 F.2d 319, 325 (8th Cir.) (§ 2515 "imposes an evidentiary sanction to compel compliance with § 2511"), *cert. denied*, 429 U.S. 1000 (1976). It "serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings' ". *Gelbard*, 408 U.S. at 51 (footnote omitted).

Section 2515 is not applicable. The intercepted information was used only in the sense that it was investigated because it was the basis for some of the charges against a police officer. The information was not offered or introduced into evidence at any trial, hearing, or proceeding, but was instead the subject of an investigation. The Dallas Police Department General Orders Code of Conduct (1988), submitted by the appellees in support of their summary judgment motion, provides for complaint investigations to be classified as either "formal, preliminary, or summary (informal)". As noted, preliminary investigations, such as the one at issue, do "not reflect on the personnel record of any member involved unless a violation is identified, in which case a formal complaint will be authorized by the Internal Affairs Division Commander". The investigation was conducted through telephone and personal interviews and written reports; there was no hearing or other proceeding in which evidence was introduced.

We agree with the Court of Appeals for the District of Columbia that "[t]he statutory context . . . in which 'proceeding' appears in company with 'trial' and 'hearing,' suggests something similarly adversarial – not an *ex parte* administrative determination of the sort here at issue [a non-responsibility determination made by an Air Force contracting officer]". *Cubic Corp. v. Cheney*, 914 F.2d 1501, 1504 (D.C. Cir. 1990). The title of § 2515 – "Prohibition of use *as evidence* of intercepted wire or oral communications" (emphasis added) – clearly supports that interpretation. As the *Cubic Corp.* court noted, § 2515 also contains "an express reference to the powers of 'the judge' before whom the 'motion to suppress' is to be made. . . . The more sensible reading is that the statute applies only to an adversarial proceeding, like a trial or other hearing, before a 'judge.' " *Id.* at 1504. That reasoning applies with equal force here. A preliminary internal affairs investigation is not a realistic forum in which to move to suppress the wiretap information, because it does not include any sort of "hearing" at which a judge presides.[26]

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[26] The *Cubic* court stated:

> As a practical matter, . . . an *ex parte* administrative determination is not a realistic forum in which to raise a Title III claim. The party to which the wiretap information applies would have to be given an opportunity to make something like a 'motion to suppress' the information before the agency could consider it, a hearing would have to be convened, and a . . . judge brought in to preside. Meanwhile, the agency could not make a decision, or at least not a decision adverse to the subject of the wiretap information. All this seems like a most improbable way of doing business,

The *Cubic* court pointed out that the legality of the use of intercepted information could be challenged "when a court reviews an administrative decision on a record that allegedly contains unlawfully intercepted wiretap information", by moving to suppress under § 2518. *Id.* at 1506.[27] Similarly, if the internal affairs investigation had identified a violation and a formal complaint had been filed, resulting in an adverse determination, Forsyth and Kirks would have been free to challenge in court the Internal Affairs Division's reliance on information derived from the wiretap.

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and until the agency actually makes an adverse decision based upon the wiretap information, an unnecessary complication, too. Without clearer congressional direction to that effect, we are reluctant to conclude that [the Act] was meant to be so disruptive a force in the administrative process.

914 F.2d at 1504.

[27] The *Cubic* court noted:

Our decision does not preclude the Air Force from considering untested wiretap information in making a non-responsibility determination, without thereby creating a right in anyone to challenge the provenance of that information. If the agency's decision is challenged in a subsequent judicial proceeding, however, an aggrieved person has the same right to move to suppress the information as that person would have if the agency were formally moving the admission of the information in evidence before the court. In other words, if an agency relies upon wiretap evidence in rendering a reviewable decision, it must be prepared to defend in court the legality, under [the Act], of the wiretap that produced it.

Id. at 1506.

Moreover, even in the context of an adversarial proceeding to which § 2515 applies, that section does not preclude *all* use of illegally intercepted information. For example, in *United States v. Caron*, 474 F.2d 506, 508-10 (5th Cir. 1973), our court held that unlawfully intercepted information may be used for impeachment. Three other circuits also have recognized this impeachment exception in criminal cases. *United States v. Echavarria-Olarte*, 904 F.2d 1391 (9th Cir. 1990); *United States v. Vest*, 813 F.2d 477, 484 (1st Cir. 1987) (recognizing impeachment exception, but declining "to read into [§] 2515 an exception permitting the use of illegally-intercepted communications in perjury prosecutions"); *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).[28]

Finally, § 2515 is not self-executing, but is instead dependent upon a motion to suppress, pursuant to § 2518(10) (a) (any aggrieved person may move to suppress the contents of any unlawfully intercepted communication). That section "provides the remedy for the right created by [§] 2515." S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2195; *see United*

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[28] The impeachment exception has not been extended to civil cases. *Williams v. Poulos*, 11 F.3d 271, 288 (1st Cir. 1993); *United States v. Wuliger*, 981 F.2d at 1506; *Anthony v. United States*, 667 F.2d at 879; *cf. United States v. Farese*, 611 F.2d 67, 71 (5th Cir. 1980) (although § 2515 does not apply to evidence used solely for impeachment purposes, Congress "did not intend to make an exception for sentencing hearings, bail revocation hearings, or any other proceeding in which evidence is being introduced affirmatively by the government").

States v. Cianfrani, 573 F.2d at 855; *United States v. Phillips*, 540 F.2d at 325; *In re Evans*, 452 F.2d 1239, 1243-44 (D.C. Cir. 1971) ("the committee report which accompanied the Act explicitly indicated the committee's expectation that § 2518(10)(a) would be read as the remedy for, and hence limitation on the 'right' created by § 2515"), *cert. denied*, 408 U.S. 930 (1972).

Based on the foregoing, § 2515 cannot bear the weight appellants assign it. A police department internal affairs division's disclosure or use of information, furnished by a third party, to conduct a preliminary investigation in a non-adversarial context is not a violation of § 2515; it cannot support a civil action under the Act. Such an action must be grounded, instead, on violations of §§ 2511(1) (c) (disclosure) and (d) (use).[29] As noted, in such an action, the plaintiff "must demonstrate '1) the information used or disclosed came from an intercepted communication, and 2) sufficient facts concerning the circumstances of the interception such that the defendant could, with presumed knowledge of the law, determine that the interception was prohibited in light of [the Act]' ". *Williams v. Poulos*, 11 F.3d at 284 (quoting *Thompson v. Dulaney*, 970 F.2d at 749). "This demonstration includes a showing that any statutory exceptions asserted by a defendant do not, in fact, apply". *Id.* Accordingly, we turn to the exceptions claimed to be found in § 2517(1) and (2).

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[29] Of course, liability may lie under § 2511(1) (a) against a person who intercepted, or procured another to intercept, the communications. As noted, the appellants settled with the claimed interceptors – the Dulworths, Barr and Grogan.

2.

Subsections 2511(1) (c) and (d) are qualified by the introductory phrase, "Except as otherwise specifically provided in this chapter [the Act]". 18 U.S.C. § 2511(1). In other words, although the disclosure or use of illegally intercepted communications by a person who knows or should know of the illegality of the interception is usually proscribed, it may be authorized under other provisions of the Act. And, as stated, the district court held that, in conducting the investigation, the appellees, disclosure (to other law enforcement officers) and use of the intercepted information were authorized by § 2517(1) and (2). Those subsections provide that a "law enforcement officer who, by any means authorized by this chapter [the Act], has obtained knowledge of the contents of" intercepted communications, may disclose or use those contents as "appropriate to the proper performance of [his] official duties".[30]

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[30] The Act states in relevant part:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

18 U.S.C. § 2517(1) and (2).

These subsections provide "for limited non-public disclosure. Disclosure by one law enforcement officer to another, and use of a communication by a law enforcement officer in the performance of his duty, are authorized if such disclosure or use is appropriate to the 'proper performance of the official duties of the officer' ". *United States v. Cianfrani*, 573 F.2d at 855 n.7. The statutory phrase, "appropriate to the proper performance of the [officer's] official duties" was "designed to protect the public from unnecessarily widespread dissemination of the contents of interceptions and from the wholesale use of [such] information . . . by an officer . . . for personal or illegal purposes". *United States v. Daniel*, 667 F.2d 783, 784 (9th Cir. 1982) (quoting *United States v. Hall*, 543 F.2d 1229, 1233 (9th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1075 (1977)).

Vines, Walker, and Rollins are "law enforcement officers" within the meaning of §§ 2517(1) and (2) and 2510(7).[31] And, their disclosure and use of information related to them by Barr and Grogan was "appropriate to the proper performance of [their] official duties", as required by § 2517(1) and (2); appellants do not claim

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[31] The Act defines "investigative or law enforcement officer" as:

> any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

18 U.S.C. § 2510(7). It is undisputed that Vines, Walker, and Rollins fall within this definition.

otherwise.[32] Rather, the dispute centers solely on whether the officers obtained the information by a "means authorized by" the Act, as also required by § 2517(1) and (2). The appellants contend that the district court created an "internal affairs" exception not sanctioned by the Act, asserting that the phrase "by any means authorized by this chapter" in § 2517(1) and (2) limits disclosure and use to only information obtained through a judicially authorized wiretap.[33]

The Act ("this chapter") includes only 11 sections. The phrase "by any means authorized by this chapter" in § 2517 is not covered in the definitions section, § 2510. Section 2511 does provide for lawful intercepts without a judicial order, such as when, under certain circumstances, the interceptor is also a party to the communication, or a party to the communication has given prior consent. *See* 18 U.S.C. § 2511(2) (c) and (d). But, the Act does not address expressly someone unlawfully intercepting a communication, and then providing that information to law enforcement officers.

Because the plain wording of the Act does not address the situation at hand, we must engage in statutory construction. In so doing, we are aware from our

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[32] The Dallas Police Department General Orders for 1983 require the Internal Affairs Division to "[e]nsure the complete and impartial investigation of all complaints against any employee of the Department". Those Orders provide further that " [a]n investigation will be conducted into all allegations of criminal misconduct *regardless of the source*". (Emphasis added.)

[33] Of course, the Act provides that information intercepted in specified other ways does not run afoul of its general proscription against interceptions. *See, e.g.*, § 2511(2)(c) and (d).

court's past experiences, as reflected in part in note 25, *supra*, that construction of the Wiretap Act is fraught with trip wires. *See, e.g., Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414 (5th Cir. 1980); *Fleming v. United States*, 547 F.2d at 873 ("Our analysis of . . . [§§ 2515 and 2517] makes us confident of only one conclusion: the statute is not a model of clarity"); *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974). As hereinafter reflected, construction of § 2517(1) and (2) is no exception; we balance on a high wire. The one clear, and most helpful, signal is the legislative history, quoted later.

As described, § 2517(1) and (2) concern "investigative or law enforcement officer[s] who, by any means authorized by this chapter, [have] obtained knowledge" of communications, and provide that they may disclose or use such contents as "appropriate to the proper performance of the official duties of the officer [either] making or receiving the disclosure", or using the information. Section 2517, read as a whole, runs counter to appellants' contention that the phrase "by any means authorized by this chapter [the Act]" limits disclosure and use under § 2517(1) and (2) to that information obtained either through a judicially-authorized wiretap or otherwise in accordance with the Act.

The plain wording of § 2517(3) aids in convincing us that disclosure and use under 2517(1) and (2) of unlawfully intercepted information that is otherwise conveyed lawfully to law enforcement officers is permitted; in sum, that information disclosed or used under those subsections need not be only that which is intercepted "in accordance with" the Act:

> Any person who has received, *by any means authorized by this chapter*, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom *intercepted in accordance with the provisions of this chapter* may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

18 U.S.C. § 2517(3) (emphasis added). This subsection, while using the phrase "by any means authorized by this chapter" also found in § 2517(1) and (2), uses a phrase not found there: "intercepted in accordance with the provisions of this chapter". In other words, anyone who lawfully receives information *that was also intercepted in compliance with the Act* is allowed greater disclosure of that information than is permitted by the more narrow boundaries of § 2517(1) and (2); that person may disclose that information through testimony in designated proceedings. And, obviously, had Congress wanted to likewise limit § 2517(1) and (2) disclosure and use to only that information "intercepted in accordance with" the Act, it knew how to say so.

Furthermore, to read § 2517(3) so that "by any means authorized by this chapter" equates with "in accordance with the provisions of this chapter", as appellants would have to do, would render the latter phrase superfluous. Needless to say, a maxim of statutory construction precludes one part being read so as to render another superfluous. *E.g., United States v. Chen*,. 913 F.2d 183, 190 (5th Cir. 1990) (quoting *Duke v. University of Texas*, 663 F.2d

522, 526 (5th Cir. 1981)) ("It is well established that a statute should be construed so that each of its provisions is given its full effect; interpretations which render parts of a statute inoperative or superfluous are to be avoided.").

The use permitted under § 2517(1) and (2) for unlawfully intercepted information that was received lawfully by an officer also seems supported by § 2517(5), which states:

> When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications *in the manner authorized herein*, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that *the contents were otherwise intercepted in accordance with the provisions of this chapter*. Such application shall be made as soon as practicable.

18 U.S.C. § 2517(5) (emphasis added). Pursuant to this section, information obtained by an officer conducting an authorized wiretap, even though it is outside the boundaries specified in the authorization order, may be used for the purposes of § 2517(1) and (2), such as for an internal investigation, but may not be used for a more extensive

or public purpose (testimony in the type proceeding specified in § 2517(3)), unless first authorized by a judge. This, again, demonstrates the distinction between public disclosure through testimony and disclosure or use for "the proper performance of the official duties" of a law enforcement officer, as in the investigation in this case. Much greater latitude is allowed for the source of information for the latter.

It can be argued that the exception permitted under § 2517(5) (for § 2517(1) and (2) disclosure and use of information outside that permitted by a wiretap order) is the only exception to the Act's proscribing the disclosure or use of information not obtained in accordance with the Act – that it is the exception envisioned by the phrase "any means authorized by this chapter" found in § 2517(1) and (2). But, such a narrow reading of the phrase, as urged by the appellants, would permit using only the contents of interceptions made in accordance with the Act, such as through a judicially-approved wiretap or by consent under certain circumstances. This would mean that officers receiving information about police misconduct, obtained through an illegal interception by a third party, could not use that information to investigate, and possibly prevent, the misconduct, no matter how serious, imminent, or life threatening. This flies in the face of common sense, and would require us to read § 2517(1) and (2) in a manner that compels an absurd result.

The well established maxim against a construction that would clothe Congress with intending such a result does not permit such a reading in this instance. *See, e.g., Public Citizen v. United States Dep't of Justice*, 491 U.S. 440,

454 (1989) (brackets, internal quotation marks, and citation omitted) ("Frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."); *Ecee, Inc. v. Federal Energy Regulatory Comm'n*, 611 F.2d 554, 564 (5th Cir. 1980) (brackets, internal quotation marks, and citation omitted) ("A construction of a statute leading to unjust or absurd consequences should be avoided").

Because of the lack of clarity in § 2517, we look to the Act's legislative history. *E.g., Toibb v. Radloff*, ___ U.S. ___, 111 S. Ct. 2197, 2200 (1991) (internal quotation marks omitted) ("Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear."); *Stone v. Caplan (Matter of Stone)*, 10 F.3d 285, 289 90 (5th Cir. 1994) (court can consider legislative history in interpreting ambiguous statute). And, as stated earlier, that the phrase in question cannot be read as narrowly as appellants urge is covered expressly by that history:

> Neither paragraphs (1) nor (2) [of § 2517] are limited to evidence *intercepted in accordance with the provisions of the proposed chapter*, since in certain limited situations *disclosure and use of illegally intercepted communications would be*

> *appropriate* to the proper performance of the officers' duties. For example, such use and disclosure would be necessary in the investigation and prosecution of an illegal wiretapper himself.

S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188 (emphasis added); *see also United States v. Liddy*, 354 F. Supp. 217, 221 (D.C.D.C. 1973) (citing legislative history, and rejecting contention that absolutely no disclosure is permitted by the Act, because it would prevent persons who have allegedly violated the Act from being prosecuted; Congress did not intend for Act "to be self-emasculating"), *aff'd* 509 F.2d 428 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 911 (1975).[34] No more

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[34] In dictum, the Second Circuit has described § 2517(1) and (2) in a manner consistent with our reading and the legislative history, focusing on whether the officers gained knowledge of the contents of the intercepted communications lawfully, rather than on whether the interception was lawful:

> Subsection 1 [of § 2517] permits "any investigative or law enforcement officer" *who has lawfully obtained knowledge of the contents of any intercepted communication* to "*disclose* such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate" in the performance of their official duties. Subsection 2 authorizes investigative or law enforcement personnel *who have lawfully obtained knowledge of any intercepted communications* "to *use* such contents to the extent such use is appropriate to the proper performance of [their] official duties."

Application of Newsday, Inc., 895 F.2d 74, 76 (2d Cir.) (emphasis added), *cert. denied*, 496 U.S. 931 (1990). *Cf. United States v. Vest*, 813 F.2d 477 (1st Cir. 1987), discussed earlier in part II.B.1., where the court held that, pursuant to § 2515, illegally intercepted information was inadmissible as evidence, even though the government played no role in the interception.

need be said; the facts at hand present one of the "limited situations" forecast by the legislative history for allowing use of illegally intercepted information.[35] *See also United States v. Ross*, 713 F.2d 389, 392 (8th Cir. 1983) (quoting *Roberts v. United States*, 445 U.S. 552, 558 (1980)) ("the limitations Congress placed on the willful disclosure of wire communications in subsection 2511(1)(c) should not be examined in a vacuum. As the Supreme Court has emphasized, a 'deeply rooted social obligation' exists for citizens to report felonies to the authorities").[36]

> [A]n invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere. The impact of this second invasion is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor.

Id. at 481. *Vest* is inapposite; it did not consider or address disclosure or use authorized by § 2517(1) or (2). Instead, as noted, it concerned § 2515 (the statutory exclusionary rule), and involved a criminal prosecution for perjury, in which the government sought to introduce in evidence a conversation recorded by a third party without the defendant's knowledge. The court "decline[d] to read into section 2515 an exception permitting the introduction in evidence of an illegally-intercepted communication by an innocent recipient thereof". 813 F.2d at 481.

[35] *But see* James G. Carr, *The Law of Electronic Surveillance*, § 7.4(b), at 7-47 (1993) ("use of illegally obtained information should be limited to [investigation and prosecution of persons who violate the Act] and not expanded into other investigatory activities or purposes, despite the suggestion in Senate Report 1097 to the contrary").

[36] Cf. *Rodgers v. Wood*, 910 F.2d 444 (7th Cir. 1990), in which police officers, executing a search warrant at a building, used the owner's telephone. The owner taped all calls made on that

We hold that, under the unique facts and circumstances of this case – including that the appellees did not participate in or procure the interception, and obtained knowledge of the intercepted communications from third parties who made serious charges that an officer was engaged in administrative and criminal misconduct – the appellees' disclosure and use of the information from the intercepted communications, in conducting a preliminary internal affairs investigation, was authorized by § 2517(1) and (2).[37] We caution that this holding is narrow, limited to the facts of this case. It should not be read as undermining the salutary purpose of the Act, or as providing a means of sidestepping it.

C.

The City's appeal had its genesis when, approximately two years after this action was filed, Vines, who had been terminated as Chief of Police, moved to disqualify the City Attorney as his counsel, and requested the

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telephone, including an officer's to a reporter, advising about the warrant before it was executed (a felony under Wisconsin law). After the owner's lawyer disclosed the intercepted contents to the police department's internal affairs division and others, the officers sued the lawyer, and were awarded damages. The Seventh Circuit rejected a claim to a common law privilege for statements to police officers in the course of investigation of criminal activity. (Needless to say, § 2517 was not in issue; the suit was not against the police.)

[37] Our holding precludes reaching the appellants' state law claims, which are premised on the same facts and circumstances as their federal claims. They requested reinstatement of the state claims only if the summary judgment on the federal claims was reversed.

appointment of independent counsel, to be paid by the City. He claimed a conflict of interest because the City Attorney was involved in presenting charges which led to Vines' prosecution for misdemeanor perjury in an unrelated matter.

At a hearing on the motion, Vines stated that he had presented a claim for damages to the City, related to his discharge, and intended to file a civil action if the matter was not resolved. The district court granted the motion, finding that the past relationship of Vines and the City Attorney's office, as it related to both the perjury charge and Vines' damages claim, constituted a sufficient basis for finding a conflict.

The City moved for reconsideration, pointing out that, subsequent to filing his disqualification motion, Vines was acquitted of perjury, and asserting that the order to pay attorney's fees exceeded the scope of the court's authority. The court denied the reconsideration motion, stating:

> The conflict arises from the City Attorney's attempt to represent Vines in this action while simultaneously taking an adverse position to that of Vines in a criminal proceeding, and in Vines' claim for damages against the City. In such a situation, an attorney's loyalty to the client is called into question.

We review the rulings only for abuse of discretion.[38] *See In re Dresser Industries, Inc.*, 972 F.2d 540, 542 n.4 (5th

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[38] In July 1991, our court denied the City's petition for a writ of mandamus concerning the disqualification order. Although the parties have not addressed whether that order is

Cir. 1992) (citing *In re Gopman*, 531 F.2d 262 (5th Cir. 1976)).

The City claims first that Vines failed to establish a conflict of interest. At the conclusion of the hearing, the court stated that the relationships between Vines and the City "certainly offer the greatest potential for conflict of interest that can be imagined", and held that disqualification was necessary "in order to ensure that Vines receives effective and impartial representation". The court was well within its discretion.

The City asserts next that the district court should not have reached the issue of attorney's fees. We disagree. As the district court noted in its order denying the reconsideration motion, it did not order the City "to pay a certain fee to any particular attorney, but has only ordered that the City will be responsible for the necessary and reasonable fee". This was not an abuse of discretion.

Finally, the City contends, in the alternative, that the disqualification should apply only to the extent that Vines is sued in his individual capacity, asserting that a

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final, we note that a judgment determining liability for attorney's fees, but not awarding a specified amount of fees, is interlocutory in nature. *See Echols v. Parker*, 909 F.2d 795, 798 (5th Cir. 1990); *Deloach v. Delchamps, Inc.*, 897 F.2d 815, 826 (5th Cir. 1990); *Hay v. City of Irving, Tex.*, 893 F.2d 796, 800 (5th Cir. 1990). But here, the City is appealing the disqualification of the City Attorney; it apparently does not contest its paying reasonable attorney's fees if there is a conflict of interest. In fact, it concedes that Texas law provides a statutory basis for a municipality to employ outside legal counsel to defend a lawsuit against an employee when there is a conflict (or potential conflict) of interest between the municipality and employee.

suit against Vines in his official capacity is a suit against the City, and that to prohibit the City Attorney from representing Vines in that capacity effectively denies the City its right to represent itself. Responding to a similar contention in its order denying reconsideration, the district court stated that "[t]he obligation to pay the fees applies to the representation of Vines in both his individual and official capacities". For obvious reasons, because the court found a conflict of interest, we do not consider this ancillary ruling an abuse of discretion.[39]

III.

For the foregoing reasons, the judgment and the ruling on counsel for Vines are

AFFIRMED.

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[39] We note that, on appeal, and contrary to the concerns expressed by the City, Vines adopted the City's brief on the merits. He briefed only the separate counsel issue.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAN FORSYTH, et al.,

Plaintiffs,

CA 3-89-0447-T

v.

JOHN BARR, et al.,

Defendants.

ORDER GRANTING DEFENDANTS CITY OF DALLAS, MACK VINES, DWIGHT WALKER AND WILLARD ROLLINS' MOTION FOR SUMMARY JUDGMENT

(Filed Nov. 18, 1991)

This matter is before the court on the April 1, 1991, Motion for Summary Judgment filed by Defendants City of Dallas, Mack Vines, Dwight Walker and Willard Rollins. Plaintiffs filed a response on May 21st.

This action arises out of an alleged illegal wiretap placed on the telephone of Plaintiffs Charles and Susan Bruton during a period in which they acted as confidential informants for the Dallas Police Department, specifically for Officers Jan Forsyth and Richard Kirks. Plaintiffs allege that the actions of Defendants violated 18 U.S.C. § 2510, *et seq.* by the interception, disclosure and the intentional use of wire, oral or electronic communications. Plaintiffs also allege common and state law claims for invasion of privacy.

Before and during the time of the alleged wiretapping, Defendant George Grogan employed Co-Defendant John Holman Barr to represent him in connection with charges directed against Grogan by Charles Bruton and the government on the illegal disposal of toxic wastes. In their complaint, Plaintiffs assert that Barr, in the course of his activity with the Dallas Police Department, learned that Plaintiffs Forsyth and Kirks were working in an undercover capacity with Bruton. Later, Barr contacted Forsyth and requested, unsuccessfully, that she encourage Bruton to recant his allegations with respect to the toxic waste charges leveled against Grogan.

Plaintiffs assert that Grogan and Barr sought the aid of Co-Defendants Homer Dulworth, Joyce Dulworth and Gary Dulworth[1] to discredit Bruton, and then arranged to have the telephone lines to the Dulworths' home and to the Brutons' home wired in such a way that when the telephone in the Brutons' home was used, a previously disconnected telephone at the Dulworths' home could be used to listen and record the conversations on the Brutons' telephone. The Dulworths listened to several of the Brutons' telephone conversations, including conversations with Forsyth and Kirks, and apparently passed the information gained from the calls to Grogan who then informed Barr. Plaintiffs allege that later, on September 22, 1988, Barr and Grogan used information obtained

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[1] The Dulworths and Brutons live at 4141 Middlefield Road and 3737 Middlefield Road, Dallas, Texas, respectively. Grogan owns a house located at 3729 Middlefield Road. The Bruton property is adjacent to the Grogan property and across the street from the Dulworth property.

from the illegal interception to place unfounded and fabricated charges against Forsyth and Kirks with the Dallas Police Department Internal Affairs Division. Barr filed an affidavit with the Dallas Police Department asserting that he believed Forsyth engaged in conduct which violates state statues [sic] and violates the Code of Conduct of the Dallas Police Department.

In their complaint, Plaintiffs assert that Defendants Mack Vines, Chief of Police for the City of Dallas, Dwight Walker, Captain in charge of the Internal Affairs Division of the Dallas Police Department, and Willard Rollins, Captain in charge of the Intelligence Division,[2] received information from Defendants Barr and Grogan on behalf of the City of Dallas which included knowledge that the source of the information was partially from the illegal interception of the telephone conversations between Plaintiffs. Plaintiffs contend that these Defendants acted outside the law when they failed to instruct Barr and Grogan to cease the interception of telephone conversations on the Brutons' telephone, and when they continued to receive the intercepted information. As a result of the information received, an internal affairs investigation was conducted.

Defendants move the court to grant summary judgment in their favor with respect to Plaintiffs' claims. Defendants contend that their actions do not constitute a violation of the wiretap statute, and that Plaintiffs have failed to state a claim upon which relief can be granted in

---

[2] The court notes that these Defendants occupied these positions during the relevant time periods.

light of their defense of qualified immunity and municipal liability, and that Plaintiffs' supplemental state claims should be dismissed.

Summary Judgment Standard

This action is before the Court on a motion for summary judgment. Pursuant to Fed. R. Civ. P. 56(c), summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed.2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). The burden of showing entitlement to summary judgment falls squarely and with great weight upon the moving party. *Pitts v. Shell Oil Company,* 463 F.2d 331 (5th Cir. 1972). For summary judgment to enter, the pleadings, depositions, admissions, and affidavits, must be considered in the light most favorable to the nonmoving party. *Galindo v. Precision American Corp.,* 754 F.2d 1212 (5th Cir.), *reh'g denied,* 762 F.2d 1004 (1985).

Discussion

The Federal Wiretap Act, 18 U.S.C. § 2510 *et seq.,* provides for civil damages against those who violate its provisions. Section 2520 provides in pertinent part:

> [A]ny person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or

> entity which engaged in that violation such relief as may be appropriate.

To recover under § 2520, Plaintiffs must show that Defendants violated § 2511 which prohibits the interception, disclosure or use of any wire, oral or electronic communication. A person violates § 2511 if he –

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use any electronic, mechanical, or other device to intercept any oral communication . . . ;
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronics communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection. . . .

Plaintiffs allege that "Defendants and including the City of Dallas, Texas, acting through its Police Chief, Assistant Chief and a Police Captain, acted outside the law and without the authorization of law and each one of them violated 18 U.S.C. § 2510 *et seq.*, and 18 U.S.C. § 2520

by the interception, disclosure and the intentional use of wire, oral or electronic communications."

Interception of Communication

> Title III the 1968 'Omnibus Crime Control and Safe Streets Act,' codified at 18 U.S.C. §§ 2510-2520, proscribes generally the interception or disclosure of wire or oral communications, and provides a procedure through which law enforcement officials can be authorized to intercept such communications in certain limited circumstances.

United States v. Turk, 526 F.2d 654 (5th Cir. 1976). An "interception" is defined in 18 U.S.C. § 2510(4) as follows:

> '[I]ntercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

The phrase "acquisition . . . through the use of any . . . device" suggests that the central concern is with the activity engaged in at the time of the oral communication which causes such communication to be overheard by uninvited listeners. *Turk*, 526 at 658. An "interception" requires, at the least, involvement in the *initial* use of the device contemporaneous with the communication to transmit or preserve the communication. *Id.* at 658. A telephone conversation is a wire communication, *see Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 417 (5th Cir. 1980), and therefore, covered by the wiretap statute.

Upon review of the motion, the evidence submitted in support of the motion and relevant authority, the court is of the opinion that Defendants are entitled to summary

judgment in their favor with respect to Plaintiffs' claims pursuant to § 2511(a) and (b). Assuming that the information was unlawfully gained, Plaintiffs have not asserted or offered summary judgment evidence sufficient to raise a question of material fact that Defendants Vines, Walker and Rollins participated in the switching of telephone lines and connections which made the interception of the Brutons' telephone conversations possible, that they directly listened to the conversations, or that they solicited any other person to intercept, listen to, or endeavor to intercept the communications. Plaintiffs have not submitted evidence indicating that Defendants used the Dulworths' telephone or procured anyone else to use it. Plaintiffs have failed to submit evidence that Defendants monitored the phone or had any agreement with the Dulworths or anyone else regarding future conversations. Plaintiffs have not shown that the conversations were overheard as a result of suggestions of police direction, coercion, or assistance. There is no evidence that Defendants Vines, Walker or Rollins acquired knowledge of the contents of the conversations other than through the initiative of Barr and Grogan to come forward with the information to the Dallas Police Department.

Moreover, Plaintiffs have not provided evidence that Vines, Walker and Rollins listened in on illegally intercepted telephone conversations after Barr and Grogan reported the information to them. Plaintiffs have merely asserted that Defendants failed to remove the allegedly illegal wiretap device and continued to use the information obtained from the device for an internal investigation. The court finds that such conduct in the circumstances of this case, even if true, does not violate

the statute. The court finds that there is no evidence that Vines, Walker and Rollins intercepted Plaintiffs' phone conversations, procured any other person to intercept, or used any device or procured any other person to use a device to intercept Plaintiffs' conversations within the meaning of the statute. The court concludes that Defendants are entitled to judgment as a matter of law with respect to claims asserted under § 2511(a) and (b).

Disclosure and Use of Communication

Plaintiffs have failed to establish that the law prohibits Defendants' disclosure and use of the contents of the telephone conversations for an internal investigation under § 2511 (c) and (d) of the wiretap statute. Plaintiffs have failed to establish that Defendants' use of the information to launch an internal investigation into the possible corruption of its police officers is prohibited by the wiretap statute, or that it does not fall with the authorized disclosure and use provision of § 2517(1). Section 2517(1) provides:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

As previously discussed, Plaintiffs have failed to show that Vines, Walker and Rollins obtained knowledge of the

contents of the telephone conversations by methods violative of the wiretap statute. It is undisputed that Vines, Walker and Rollins used information from Plaintiffs' telephone conversations to form part of the basis of an internal affairs investigation. However, the Internal Affairs Division of the Dallas Police Department is charged with the official duty of ensuring the complete and impartial investigation of all complaints against any employee of the department. Plaintiffs have failed to show that the disclosure and use was for an improper purpose and not authorized by this section as appropriate to the proper performance of the official duties of Vines, Walker and Rollins. Accordingly, Defendants Vines, Walker and Rollins are entitled to summary judgment as a matter of law.

As Plaintiffs have alleged that the City of Dallas violated the wiretap statute because of the actions of its police chief, Vines, assistant chief, Walker, and police captain, Rollins, and since Vines, Walker and Rollins are entitled to summary judgment, there is no basis for asserting liability against the City of Dallas. Accordingly, the City of Dallas is also entitled to summary judgment.

Supplemental State Claims

Plaintiffs claim that Defendants' actions constitute an invasion of privacy under the statutory and common law. Intrusion upon Plaintiffs' seclusion, or solitude, or into their private affairs requires that there be an intentional intrusion that is highly offensive to a reasonable person. *Gill v. Snow*, 644 S.W.2d 222, 224 (Tex. App. – Fort Worth

1982). This type of invasion of privacy is generally associated with either a physical invasion of a person's property or by the eavesdropping on another's conversation with the aid of wiretaps, microphones or spying. *Id.* at 224. Defendants contend that since summary judgment is appropriate on the federal claims, this court should dismiss Plaintiffs' supplemental state claims. The court, however, finds that since Plaintiffs have failed to point out a material fact dispute enabling them to withstand Defendants' motion for summary judgment with respect to the federal claims and that as liability under Plaintiffs' invasion of privacy claim is premised upon the same factual circumstances as their federal claims, Plaintiffs' state law claims are subject to dismissal.

It is therefore **ORDERED** that the motion for summary judgment filed by Defendants the City of Dallas, Vines, Walker and Rollins is granted, and Plaintiffs' federal claims and supplemental state claims against these Defendants are dismissed.

Signed this 17th day of November 1991.

/s/ Robert B. Maloney
Robert B. Maloney
U.S. District Judge

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 22 1994
OFFICE OF THE CLERK

No. 94-124

In The

Supreme Court of the United States

October Term, 1994

JAN FORSYTH, RICHARD KIRKS, CHARLES BRUTON, and SUSAN BRUTON,

Petitioners,

v.

MACK VINES, DWIGHT WALKER, WILLARD ROLLINS, and THE CITY OF DALLAS, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the contents of telephonic communications overheard by private citizens can be used by law enforcement officers in an internal administrative investigation in accord with the Federal Wiretapping Act, 18 U.S.C. § 2517(1) and (2).

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FEDERAL STATUTES INVOLVED

Section 2511 of Title 18 of the Federal Wiretapping Act provides, in pertinent part:

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use any electronic, mechanical, or other device to intercept any oral communication . . . ;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronics communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection. . . .

Section 2517(1) and (2) of Title 18 of the Federal Wiretapping Act provide:

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

STATEMENT OF THE CASE

Petitioners Forsyth and Kirks, employed as police officers for Respondent City of Dallas, were involved in an undercover drug investigation during the relevant time period. Forsyth and Kirks were members of the Intelligence Division of the Dallas Police Department ("DPD"). The investigation was facilitated by the involvement of Petitioners Charles and Susan Bruton, paid government informants. Forsyth and Kirks' investigation was conducted, in part, from the Brutons' home.

During the investigation John Barr, a Dallas attorney, filed a complaint with the DPD concerning Forsyth. Barr

met with Respondent Walker who was in charge of the Internal Affairs Division ("IAD") to discuss the complaint. At the meeting, Barr made serious allegations that Forsyth had engaged in sexual, criminal, and administrative misconduct throughout the course of the undercover investigation. Barr informed Walker that neighbors of the Brutons, Homer and Joyce Dulworth, had overheard conversations between Charles Bruton and Forsyth over one of her telephone lines. Ms. Dulworth conveyed the information from the intercepted conversations to another neighbor, George Grogan. Grogan, in turn, passed the information concerning Forsyth to his attorney, John Barr.

Barr further informed Walker that Ms. Dulworth thought the telephone had been disconnected, that it had suddenly become operable, and that she believed her telephone had become crossed with that of the Brutons. Walker was told by Barr that a wiretap was not involved, and Walker believed that the telephone had accidentally become a party line. Petitioners have conceded that the Respondents did not install any device or listen to any conversations; nor is there any evidence that Respondents participated in causing the lines to be crossed so that the Dulworths could listen to conversations between Forsyth and Bruton.

Due to the egregious nature of the allegations, Walker initiated a preliminary internal investigation of Forsyth's activities. Preliminary investigations are conducted to ensure the integrity of the police department and are not reflected in the personnel record of the employee being investigated unless a violation is identified. Walker informed Respondent Rollins, as commander

of the Intelligence Division, of the preliminary investigation of Forsyth. Respondent Vines, as Chief of Police, became apprised of the situation after meeting with Grogan, City Manager Richard Knight, and the IAD chain of command. Concerned about the integrity of the DPD and the safety of the officers involved, Rollins ordered Forsyth and Kirks: (1) not to discuss business over the Bruton telephone, and (2) not to inform anyone that they were given this order. Rollins also told the officers not to use that telephone for their contact with their informant. Forsyth and Kirks, however, continued to use the Bruton telephone. In the course of the investigation, an internal affairs investigator contacted Southwestern Bell Telephone Company to check the Dulworths' telephone line. In response, a Southwestern Bell employee examined the telephone line and located a spliced wire connecting the Dulworth and Bruton telephone lines. The spliced wire was subsequently disconnected.

In February of 1989, Forsyth, Kirks, and the Brutons filed suit alleging that Vines, Rollins, and Walker, on behalf of the City, "knowingly accepted and used information illegally intercepted from [such] telephone conversations," in violation of the Federal Wiretapping Act (the "Act"). Respondents moved for summary judgment which was granted by the district court on November 18, 1991. Forsyth, Kirks, and the Brutons appealed. The Fifth Circuit affirmed in a published opinion. *Forsyth, et al. v. Barr, et al.*, 19 F.3d 1527 (5th Cir. 1994).

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision in the present case does not warrant review because the appeals court decision correctly applies this Court's precedent and applicable law, and there is no conflict among the circuits. The Fifth Circuit held that, "in light of the appellants' scant proof, a reasonable jury could not return a verdict for [Petitioners] on the claim that the [Respondents] intentionally intercepted, endeavored to intercept, or procured anyone to intercept, the conversations . . . " *Forsyth*, 19 F.3d at 1538. Addressing the allegation of DPD's disclosure or use of information derived from an illegal wiretap, the court correctly stated that Petitioners must demonstrate (1) that the information used or disclosed came from an intercepted communication, (2) that sufficient facts concerning the circumstances of the interception show that the defendant could have determined that the interception was prohibited in light of the Act, and (3) that the statutory exceptions, enunciated in § 2517(1) and (2), do not apply. *Forsyth*, 19 F.3d at 1541. Upon application of § 2517(1) and (2) to the unique facts of this case, the Fifth Circuit properly held that Vines, Walker, and Rollins were "law enforcement officers" within the meaning of § 2517(1) and (2), and their internal use of the information provided to them by Barr was "appropriate to the proper performance of [their] official duties", as authorized by § 2517(1) and (2). *Forsyth*, 19 F.3d at 1542.

ARGUMENT SUPPORTING DENIAL OF THE WRIT

Throughout Petitioners' brief they assume the existence of an illegal interception, and cite a number of cases addressing what persons may or may not do with information illegally intercepted. Petitioners attempt to obscure from the Court's view the fact that no illegal interception was found in this case by the Fifth Circuit nor by the district court. *Forsyth,* 19 F.3d at 1534, 1537. This fact distinguishes each of the cases cited by Petitioners, and renders their arguments infirm.

A.

Citing *United States v. Giordano,* 416 U.S. 505 (1974) and *Gelbard v. United States,* 408 U.S. 41 (1972), Petitioners argue that the Fifth Circuit went outside the scope of statutory language and failed to rely on this Court's interpretation of the Act. Petitioners rely on the holding of both cases that, "Except as expressly authorized by the Act, all interceptions of oral and wire communications are flatly prohibited." *Gelbard,* 408 U.S. at 46; *See also Giordano,* 416 U.S. at 514. Petitioners ignore the fact, however, that no evidence of an illegal interception was submitted, nor was the issue addressed by the Fifth Circuit. *Forsyth,* 19 F.3d 1537, 1539 n. 23. Assuming an illegal interception, the Fifth Circuit nevertheless affirmed the decision of the district court in favor of Respondents. *Forsyth,* 19 F.3d 1527.

In *Gelbard,* this Court recognized that the Act authorized the interception, disclosure and use of information under certain circumstances. *Gelbard,* 408 U.S. at 46. The protection of privacy, however, remained the overriding concern. *Gelbard,* 408 U.S. at 48; *Giordano,* 416 U.S. 515. The Fifth Circuit, upon a review of the facts and an

interpretation of the Act, held that Respondents' use and disclosure of the information was authorized by the Act even in the event that the information was intercepted illegally. *Forsyth,* 19 F.3d 1527. This authorization was expressed in § 2517(1) and (2), discussed infra. Petitioners fail to consider the Act in its entirety, but choose to apply its bare statutory language on a piece-meal basis without an enlightened application of the facts. The Fifth Circuit's holding in this case acknowledged the maxims handed down in *Gelbard* and *Giordano,* and conformed to those concerns by allowing the use and disclosure of information only in strict adherence to those situations authorized by the Act.

B.

Petitioners contend that the Fifth Circuit's decision in this case constructively resurrects the silver platter doctrine rejected by this Court in *Elkins v. United States,* 364 U.S. 206 (1960). Under the silver platter doctrine, evidence obtained by state agents in an unreasonable search and seizure was admissible in a federal criminal trial, where no federal agent participated in the search and seizure and the state officers did not act solely on behalf of the United States. *Elkins,* 364 U.S. 206. While petitioners have correctly restated the silver platter doctrine in their petition, their reliance upon *Elkins* in this case is misplaced because of two material distinctions.

First, in Elkins there was an illegal seizure of evidence by a law enforcement officer. The Court ruled that evidence obtained by state officers during a search which, if conducted by federal agents, would have violated a defendant's right to be free from unreasonable searches and seizures under the Fourth Amendment is inadmissible in a federal criminal trial. *Elkins,* 364 U.S. at 223. The

Court determined that the victim was not concerned with whether evidence against him was illegally obtained by a federal agent or by a state officer. *Elkins,* 364 U.S. at 215. It was the actual illegal **seizure** of evidence by **any** law enforcement official that brought about the rejection of the silver platter doctrine in *Elkins* and **not** the passing of evidence to an agent with "clean hands". *Elkins.*

Petitioners conceded at oral argument in the Fifth Circuit that none of the Respondents installed any device or listened to any of the telephonic communications intercepted by the Dulworths. *Forsyth,* 19 F.3d at 1535. The facts also indicate that no police officer was present during the time the communications were intercepted. (R., Vol. 8, pp. 436, 483, 502, 577). The *Elkins* decision dealt solely with the illegal seizure of evidence by law enforcement authorities and not with the reception of information by private citizens. *Elkins.* Petitioners ignore the obvious distinction that the protections championed in *Elkins* safeguard citizens from only the obtrusive acts of governmental authorities and not those of other private citizens.

Second, *Elkins* focused on the admissibility of evidence in criminal trials. *Elkins.* Petitioners are attempting to advance their Title III claim by applying the *Elkins* exclusionary rule to information simply being used in an internal administrative investigation. Citing *Cubic Corp. v. Cheney,* 914 F.2d 1501, 1504 (D.C. Cir. 1990), the Fifth Circuit correctly held that "an ex parte administrative determination is not a realistic forum in which to raise a Title III claim," because it would suffocate the intent and purpose of such preliminary actions. *Forsyth,* 19 F.3d at 1540. The Fifth Circuit went on to state that had the

preliminary investigation identified a violation by Forsyth and/or Kirks and a formal complaint had been filed resulting in an adverse determination, they would have been free to challenge in court the reliance on information derived from a wiretap. *Forsyth,* 19 F.3d at 1540-41. Petitioners' reasoning attempts to show that the principles espoused in *Elkins* apply to the instant case. Petitioners fail, however, to consider the present facts and their lack of analogous traits to those in *Elkins.*

C.

Petitioners assert that the Fifth Circuit's holding in this case conflicts with the Seventh Circuit's refusal, in *Rodgers v. Wood,* 910 F.2d 444 (7th Cir. 1990), to recognize a common law privilege protecting statements made to police officers in furtherance of investigating criminal activity as an exception to the Act. The *Wood* case involved police officers executing a search warrant on the property of a suspected receiver of stolen goods. During the search, the officers discovered goods believed to be stolen and the suspect was arrested. The officers then used the suspect's telephone to trace the goods and to contact an investigative news reporter. Unbeknownst to the officers, the suspect had taped their conversations. From the tapes it was apparent that, in violation of Wisconsin law, the police had previously notified the reporter of the planned search prior to the execution of the warrant.

During the suspect's ensuing criminal prosecution, his attorney disclosed the contents of the intercepted conversations to the internal affairs division of the officers' department. Subsequently, the officers filed suit claiming that the attorney's disclosure of the communications violated the Act. On appeal of the grant of summary

judgment in favor of the officers, the Seventh Circuit refused to recognize the common law privilege asserted by the attorney. *Wood*, 910 F.2d at 447. Petitioners assert that the holding in *Wood* conflicts with that of the Fifth Circuit, but they have ignored the factual distinctions between the case that renders the decisions consistent.

In *Wood*, the defendant was the attorney for the interceptor of the information and the actual deliverer of taped communications to the police. Here, Respondents are the recipients of such information as was the internal affairs division in *Wood*. *Wood* makes no mention of the plaintiff police officers bringing suit against the internal affairs officers or the police department in general for receiving the taped conversations. In the present case, Petitioners actually brought suit against the deliverers of information, as well as the receivers. Barr and Grogan were sued for alleged violations of the Act as was the attorney in *Wood*. The attorney in *Wood* lost on summary judgment and on appeal, whereas Barr and Grogan settled out of court with Petitioners. (Pet. for Writ, p. 4 n.2). Therefore, the holding in *Wood* merely establishes the potential liability of Barr and Grogan, not Respondents. The liability of Barr and Grogan, however, was never reached by the courts. *Forsyth*, F.3d at 1539 n.23.

Petitioners' claim that *Wood* creates a conflict with the Fifth Circuit's holding in this case is perplexing for yet another reason. In their Petition for Writ, Petitioners state:

> The Seventh Circuit's reasoning directly conflicts with that of the Fifth Circuit. The Fifth Circuit reasons that not allowing the police to

> use illegally obtained information to investigate potential criminal conduct "flies in the face of common sense, and would require [a reading of] § 2517(1) and (2) in a manner that compels an absurd result.". . . . Although the Seventh Circuit did not specifically address § 2517(1) and (2), their underlying reasoning still conflicts with that of the Fifth Circuit.

(Pet. for Writ, p. 13). *Wood* makes no mention of § 2517(1) and (2) as the interpretation of this section would have been irrelevant to the application of the Act to the facts of the case. Had the individual officers in *Wood* brought suit against their department for receiving and using the information as did the Petitioners here, the court's analysis would have likely involved an application of § 2517(1) and (2). Petitioners admit that the Seventh Circuit did not address this situation, yet they make the conclusory allegation that the Seventh Circuit's reasoning would compel a result that conflicts with that of the Fifth Circuit. Thus, *Wood* does not aid the Court in the resolution of this case and certainly creates no conflict among the circuits concerning the issues herein.

D.

Petitioners claim that critical to the Fifth Circuit's decision is the fact that the Respondents had no involvement in the procurement of the communications, but were merely innocent recipients thereof. It is Petitioners' contention that this holding is in conflict with that of the First Circuit in *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987). In *Vest*, the court held that illegally intercepted information was inadmissible as evidence, even though

the government played no role in the interception. *Vest*, 813 F.2d at 481. It is clear that upon an analysis of the reasoning of both circuits, the decisions are not antithetic.

Critical to the decisions of both the Fifth and First Circuits was the intended use of the information innocently received. The *Vest* decision focused upon the fact that the information was to be admitted into **evidence** in a criminal prosecution in violation of § 2515 of the Act (the statutory exclusionary rule). *Vest*, 813 F.2d at 481. Addressing the innocence of the recipient, the *Vest* Court merely refused to create an exception under § 2515 for the introduction into evidence of illegally intercepted communications by an innocent recipient. *Vest*, 813 F.3d at 480-481. The court in *Vest* did not consider or address the disclosure or use of the communications under § 2517(1) and (2), which require an inquiry into the innocent or knowing status of the recipient, as such an analysis would be irrelevant under a § 2515 determination. Addressing the § 2515 issue and the present case, the Fifth Circuit held that § 2515 was not applicable under the present facts because the information was not offered or introduced into evidence at any trial, hearing, or proceeding. *Forsyth*, 19 F.3d at 1540-41. Moreover, the court held that § 2515 is dependent upon a motion to suppress, further illustrating its applicability to evidentiary situations only. *Forsyth*, 19 F.3d at 1541.

Petitioners have misconstrued the Fifth Circuit's opinion in this case by inferring that the court focused solely upon the "clean hands" of the Respondents in determining that they did not violate the Act. The use and disclosure of the information is inherent in the analysis of § 2517(1) and (2), and was not disregarded by the

court. The court merely clarified that beyond an initial determination of the specific use and disclosure existing in a specific case, proper application of § 2517(1) and (2) requires the court to focus upon whether the officers gained knowledge of intercepted communications lawfully, rather than on whether the interception was initially lawful. *Forsyth,* 19 F.3d at 1545 n.34. Like the First Circuit in *Vest,* the Fifth Circuit in the instant case correctly focused on the use of the procured information, but was further required to ascertain the level of Respondents' knowledge. Because § 2515 did not apply in a situation involving a preliminary administrative investigation, the Fifth Circuit was required to view the disclosure and use of the information in the context of § 2517(1) and (2).

Section 2517 provides that if a law enforcement officer has **lawfully obtained knowledge** of the contents of any intercepted communication, the officers are allowed to (1) disclose such contents to another investigative or law enforcement officer, and (2) use such contents to the extent such use and disclosure is appropriate to the proper performance of [their] official duties. *Forsyth,* 19 F.3d at 1545, *citing Application of Newsday, Inc.* 895 F.2d 75, 76 (2d Cir. 1990) (emphasis added), *cert. denied,* 496 U.S. 931 (1990). Here, the information was to be used in conducting a preliminary internal affairs investigation, referred to by the court as an "ex parte administrative determination," and not in an evidentiary setting. *Forsyth,* 19 F.3d at 1540. The Fifth Circuit correctly held that such disclosure and use was authorized by § 2517(1) and (2).

The district court did not inquire into the legality of the interception. *Forsyth,* 19 F.3d at 1538. Illegality was assumed by the Fifth Circuit for the purpose of interpreting the Act as applied to an issue of first impression. *Forsyth,* 19 F.3d at 1539. No evidence was submitted by Petitioners to support their claim of an illegal interception, much less an illegal wiretap. *Forsyth,* 19 F.3d at 1537. Because Petitioners' theory supporting a grant of certiorari is dependent upon the existence of an illegal wiretap and an illegal interception, they have chosen to ignore any examination of § 2517(1) and (2). This is fatal to their argument because the Fifth Circuit's decision in this case is based upon a thorough and precise analysis of the evidence presented by Petitioners and upon a careful analysis of the intent of § 2517(1) and (2). The court did not create a new exception to the Act. The Fifth Circuit was careful to limit its decision to "such use and disclosure" that was present in this case. *Forsyth,* 19 F.3d at 1539.

E.

Petitioners attempt to obscure or misrepresent the facts to create an illusory conflict between the Fifth Circuit's decision and those of the Sixth Circuit in *Fultz v. Gilliam,* 942 F.2d 396 (1991) and *United States v. Jones,* 542 F.2d 661 (1976). *Gilliam* and *Jones* each concerned a husband's interception of communications of his wife accused of having an extra-marital affair. Holding that the interception violated the Act, the court found the

language of the Act to be straightforward and comprehensive in prohibiting all electronic surveillance not specifically authorized by the Act. *Gilliam* at 400; *Jones* at 666. Petitioners state that in *Gilliam* and *Jones*, the Sixth Circuit made it equally clear that the Act prohibits the use and disclosure of all illegal wiretaps. While Respondents agree that the Act prohibits interception of communications not authorized by the Act, it does not prohibit the use and disclosure of information derived from illegal wiretaps in all situations. *Gilliam* and *Jones* involved the interspousal interception of communications in violation of § 2511(1)(c) and (d) wherein the defendant husband claimed interspousal immunity in disclosing the information. Petitioners ignore the plain language in *Gilliam*, where the Sixth Circuit refused to recognize interspousal immunity under the Act by holding:

> Nothing in the language of *these* subsections [2511(1)(c) and (d)] indicates to us that Congress intended a more narrow scope in prohibiting disclosure and use of wrongfully intercepted material than it did in prohibiting the interceptions themselves.

Gilliam, 942 F.2d at 400. The Sixth Circuit was correct in limiting its holdings in *Gilliam* and *Jones* to the interpretation of 2511(1)(c) and (d) because no exceptions of the Act, namely § 2517(1) and (2), applied to those sets of facts.

Subsections 2511(1)(c) and (d) are qualified by the introductory phrase, "Except as otherwise specifically provided in this chapter [the Act]." 18 U.S.C. § 2511(1). In other words, although the disclosure and use of illegally intercepted communications by a person who knows or

should have known of the illegality of the interception is usually prohibited, it may be authorized under other subsections of the Act. The Fifth Circuit properly held that the Respondents' disclosure and use of the information in conducting the investigation were authorized by § 2517(1) and (2). *Forsyth*, 19 F.3d at 1545. Section § 2517(1) and (2) are qualified by the introductory phrase, "Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication. . . . " 18 U.S.C. § 2517(1) and (2). These subsections contain no language limiting a law enforcement officer's use or disclosure of information to that legally intercepted. To further evidence this fact, the Fifth Circuit engaged in statutory construction showing that § 2517(3) allows the introduction into evidence of information "intercepted in accordance with the provisions of this chapter [the Act]." 18 U.S.C. § 2517(3). Congress chose not to limit § 2517(1) and (2) in the same manner as § 2517(3) in order to promote the proper performance of a law enforcement authority. The Fifth Circuit went a step further to reject Petitioners' contention that all use and disclosure of information from illegal wiretaps is prohibited by examining the Act's legislative history which states:

> Neither paragraphs (1) nor (2) [of § 2517] are limited to evidence *intercepted in accordance with the provisions of the proposed chapter,* since in certain limited situations *disclosure and use of illegally intercepted communications would be appropriate* to the proper performance of the officers' duties.

S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188 (emphasis added). The decisions in *Gilliam* and *Jones* are not in conflict with that of the Fifth Circuit in the present case. They simply involve different facts which require the a ication of different subsections of the Act. Recognizing that § 2517(1) and (2) applied to the facts of this case, the Fifth Circuit correctly engaged in statutory construction and employed legislative history to demonstrate that Petitioners had once again misconstrued the facts and misinterpreted the Act.

CONCLUSION

No conflict exists among the circuits as the Fifth Circuit correctly held that there was no evidence of an illegal interception, and assuming an illegal interception, the court accurately interpreted the Act in finding no violation on behalf of Respondents. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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